Comments

"AND IT ONLY TOOK THEM 307 YEARS": RUMINATIONS ON LEGAL AND NON-LEGAL APPROACHES TO DIVERSIFYING HEAD COACHING IN COLLEGE FOOTBALL[1]

I. Introduction

Just like the states are laboratories for constitutional experiments, sports are laboratories for equal opportunity in the United States.[2] While historically, the integration of professional and collegiate sports foreshadowed desegregation, the hurdle that minorities still face in achieving head coaching positions in collegiate football suggests that the glass ceiling in America has not yet shattered.[3] Myles Brand, the late President of the National Collegiate

1. Posting of Rick Chandler to DeadSpin.com, http://deadspin.com/5124494/and-it-only-took-them-307-years (Jan. 6, 2009, 13:30 EST) (reporting Yale's hiring of first black head football coach in University's history). Chandler was exaggerating of course, considering the first college football game ever played was between Rutgers and Princeton on November 6, 1869. *See* Rutgers – The Birthplace of Intercollegiate Football, http://www.scarletknights.com/football/history/first-game.asp. (last visited Oct. 31, 2009) (detailing history of Rutgers football program). The point is that even progressive-minded institutions, like Yale, are responsible for the perpetuation of discrimination in the hiring of head coaches in collegiate football.

2. *See* Brian W. Collins, Comment, *Tackling Unconscious Bias in Hiring Practices: The Plight of the Rooney Rule*, 82 N.Y.U. L. Rev. 870, 873 (2007) (noting that beginning of experiment was Jackie Robinson's breaking of color barrier in baseball); Kenneth L. Shropshire, *Merit, Ol' Boy Networks, and the Black-Bottomed Pyramid*, 47 Hastings L.J. 455, 456 (1996) (calling sports "microcosm of society"); Aaron T. Walker, Comment, *Title VII & MLB Minority Hiring: Alternatives to Litigation*, 10 U. Pa. J. Bus. & Emp. L. 245, 250 (2007) (referring to sports as "litmus test" for progress); C. Keith Harrison & Sharon Yee, Who You Know & Who Knows You: The Hiring Process & Practice of NCAA FBS & FCS Head Coaching Positions 10 (5th ed. 2008), http://grfx.cstv.com/photos/schools/bca/genrel/auto_pdf/08-hiring-report-card.pdf [hereinafter *Hiring Report Card*] (referring to sports as microcosm of society).

3. *See* Collins, *supra* note 2, at 879 (citing Robert E. Thomas and Bruce Louis Rich, *Under the Radar: The Resistance of Promotion Biases to Market Economic Forces,* 55 Syracuse L. Rev. 301, 303 (2005)); André Douglas Pond Cummings, *Pushing Weight*, 33 T. Marshall L. Rev. 95, 97-98 (explaining exclusion of minorities from decision-making roles). Kenneth Shropshire explains that, while representation levels of minorities among athletes may be indicative of equality, equal opportunity does not exist yet at the higher levels of the hierarchy in sports. *See* Shropshire, *supra* note 2, at 456-57 (referring to minority deficiencies in coaching and management positions).

Athletic Association (NCAA), described the problem during his 2007 State of the Association address when he said, "[T]he proportion of ethnic minority head football coaches is inexcusably low."[4] For some time prior to that speech, however, Brand knew that college football head coaching was the "most segregated position" in all of collegiate athletics.[5] Despite this knowledge, Brand and the NCAA continue to ignore repeated calls to reform the hiring process for college football head coaches.[6]

This Comment analyzes legal and non-legal efforts to diversify college football head coaching. Section II summarizes the state of diversity in college football head coaching, the possible causes of the dearth of minority head coaches, and the effect that the lack of diversity has upon the coaches. Section III describes the central remedy suggested by advocates – the Robinson Rule. Section III also addresses the NCAA's attempt to appease Robinson Rule supporters and explains criticism levied against the Robinson Rule. Section IV discusses the threat of legal action against universities that do and do not adopt the Robinson Rule. It explains that both private and public universities may be susceptible to Title VII liability whether they accept the Robinson Rule or not, while public universities might also expose themselves to liability for violating coaches' equal protection rights.

Section IV emphasizes the importance that statistical data will play in a Title VII suit against a university because the nature of sports, unlike many other industries, makes performance easy to quantify. Moreover, Section IV dispels some myths about the impossibility of a coach succeeding in a discrimination lawsuit, yet affirms the belief that despite the NCAA's partial responsibility, it will not be held legally accountable for the lack of diversity among head coaches. Further, Section IV analyzes the only case, thus far, where

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4. Myles Brand, President, Nat'l Collegiate Athletic Ass'n, 'Citizens in a Civil Society,' State of the Association at NCAA Convention (Jan. 15, 2007), http://www.ncaa.org/wps/ncaa?ContentID=40976 [hereinafter *Brand Address*]. During the editing of this article Brand died of pancreatic cancer. *See* Chris Dufresne, *Myles Brand Dies at 67, NCAA President*, L.A. TIMES, Sept. 17, 2009, *available at* http://www.latimes.com/news/obituaries/la-me-myles-brand17-2009sep17,0,6624982.story (eulogizing Brand's life).

5. *Hiring Report Card*, *supra* note 2, at 9.

6. *See* Michael J. Nichols, Note, *Time for a Hail Mary? With Bleak Prospects of Being Aided by a College Version of the NFL's Rooney Rule, Should Minority College Football Coaches Turn Their Attention to Title VII Litigation?*, 8 VA. SPORTS & ENT. L.J. 147, 161 (2008) (explaining that NCAA has most power to invoke change but has not utilized it); Michael S. Ford, *The BCA and the NCAA: How Title VII May Level the Playing Field in the Collegiate Coaching Ranks*, 32 RUTGERS L. REC. 88, 90 (2008) (explaining NCAA's lack of action).

a coach brought Title VII claims against a university, *Jackson v. University of New Haven*, and what that case teaches us about the need to find the right plaintiff for impact litigation. Section V explains the NCAA's grossly inadequate response to the dearth of minority coaches and why its efforts are insufficient. Finally, Section VI summarizes and proposes alternatives to the Robinson Rule that have equal potential to trigger real and immediate change.

II. THE STATE OF DIVERSITY IN COACHING

A. The Numbers

At the start of the 2009-2010 academic year, only 9 of the 119 head football coaches at Division I-A schools were minorities.[7] They included Turner Gill at the State University of New York at Buffalo, Randy Shannon at the University of Miami (FL), Mike Locksley at the University of New Mexico, Kevin Sumlin at the University of Houston, Ron English at Eastern Michigan University, Mike Haywood at the University of Miami (OH), DeWayne Walker at New Mexico State University, Mario Cristobal at Florida International University, and Ken Niumatalolo at the U.S. Naval Academy.[8] Thus, only 7.5% of Football Bowl Subdivision (FBS) head coaches are minorities.[9] If you combine all three divisions, only 4.8% of collegiate head football coaches are minorities.[10] In the history of

7. *See* Rachel Cohen, *Report Faults Diversity Hiring Practices in NCAA*, ABC NEWS.COM Feb. 19, 2009, http://abcnews.go.com/Sports/wireStory?id=6918839 [hereinafter *Report Faults Diversity*] (discussing NCAA's defense of weak hiring statistics).

8. *See Aggies to Announce Walker as Coach on Wednesday*, ESPN.COM, Dec. 30, 2008, http://sports.espn.go.com/espn/print?id=3800440&type=story (announcing hiring of minority head coach); *Redhawks Hire Former Irish Offensive Coordinator Haywood*, ESPN.COM, Dec. 24, 2008, http://sports.espn.go.com/ncf/news/story?id=3789838 (stating that minority head coach was hired); *see also* Richard Lapchick et al., *The 2008 Racial and Gender Report Card*, TIDESPORT.ORG, Feb. 19, 2009, http://www.tidesport.org/RGRC/2008/2008CollegRGRC.pdf [hereinafter *Racial and Gender Report Card*] (listing minority FBS coaches). Division I football is split into two subdivisions – I-A and I-B. *See* Andrew Wible, *FCS Programs Narrowing Gap with FBS Foes* (Aug. 29, 2008), http://www.collegian.psu.edu/archive/2008/08/29/fcs programs_narrowing_gap_wit.aspx (detailing progress of Football Championship Subdivision). Division I-A is also known as the Football Bowl Subdivision ("FBS"), while Division I-B is also known as the Football Championship Subdivision ("FCS"). *See id.* These names are used interchangeably throughout the article.

9. *See Racial and Gender Report Card*, *supra* note 8, at 14 (providing statistical breakdown of coaches' ethnicities).

10. *See id.* at 15 (showing lack of minorities in Division I-A). Whites make up 89.2%, 88.7%, and 92.5% of all coaches for all sports in Divisions I, II and III respectively. *See id.* at 4. Blacks make up 7.2%, 5.3%, and 4.0% of coaches in Divisions I, II and III respectively. *See id.* Whites hold 76.9%, 79.0%, and 88.1% of the assistant coaching positions in Divisions I, II and III respectively. *See id.* at 5. Daniel Louis notes that from 1982 to 2006, there were 414 coaching vacancies in Division I-A football and only twenty-one of them were filled with minorities. *See*

Division I-A college football, only twenty-seven minorities have ever served as head coaches.[11]

B. Isolating the Cause

In a hearing before Congress, Brand alleged three reasons for the lack of minority head coaches in collegiate sports.[12] First, Brand asserted that the NCAA cannot regulate the hiring decisions of colleges and universities.[13] Brand explained that, unlike academic reform, the hiring of coaches cannot be regulated because colleges and universities have not agreed to regulation.[14] Second, schools are "risk-averse" in hiring football head coaches because of the financial implications it has for the school.[15] There is a tremendous amount of pressure to succeed and subsequently, schools resort to hiring "proven coach[es]" rather than up-and-coming

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Daniel J. Louis, Note, *Nationally Televised Segregation: The NCAA's Inability to Desegregate College Football's Head Coaching Position*, 9 RUTGERS RACE & L. REV. 167, 172 (2007) (citing Associated Press, *Black Coaches Say Hiring Progress Too Slow: D-I Schools Did Better, But Need More Representative Search Committees*, NBC SPORTS.COM, Sept. 21, 2006, http://nbcsports.msnbc.com/id/14938013/). Shropshire adds that "the sports industry resembles a black-bottomed pyramid: large numbers of African-American athlete-participants, but few African-Americans in non-playing positions at the highest levels." Shropshire, *supra* note 2, at 456-57 (outlining that attempts to address black-bottomed pyramid "have been inadequate").

11. *See Racial and Gender Report Card*, *supra* note 8, at 36 (listing minority coaches). Those coaches are: Willie Jeffries (Wichita State), Dennis Green (Northwestern and Stanford), Cleve Bryant (Ohio University), Wayne Nunnely (Las Vegas), Francis Peay (Northwestern), Willie Brown (Long Beach State), James Caldwell (Wake Forest), Ron Cooper (Eastern Michigan and Louisville), Matt Simon (University of North Texas), Bob Simmons (Oklahoma State), John Blake (Oklahoma), Tony Samuel (New Mexico State), Jerry Baldwin (Louisiana Lafayette), Bobby Williams (Michigan State), Ron Dickerson (Temple), Fitzgerald Hill (San Jose State), Tyrone Willingham (Stanford, Notre Dame and Washington), Karl Dorrell (UCLA), Sylvester Croom (Mississippi State), Barry Alvarez (Wisconsin), Ron Prince (Kansas State), Turner Gill (University of Buffalo), Mario Cristobal (Florida International University), Randy Shannon (University of Miami), Dewayne Walker (New Mexico State), Rich Rodriguez (West Virginia University and University of Michigan), Ken Niumatalolo (Naval Academy) and Kevin Sumlin (University of Houston). *See id.* (listing minority coaches, team, years of service and record).

12. *See The Lack of Diversity in Leadership Positions in NCAA Collegiate Sports: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Prot. of the H. Comm. on Energy and Commerce*, 110th Cong. 14-18 (2007), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:35220.pdf [hereinafter *Diversity Hearing*] (explaining dearth of minority head coaches).

13. *See id.* at 15 (claiming NCAA does not have control over schools' hiring decisions).

14. *See id.* (supporting schools' autonomy). This reasoning is suspicious in light of the adoption of suggested hiring guidelines by Division I Athletic Directors. See *infra* notes 82–88 and accompanying text.

15. *See Diversity Hearing*, *supra* note 12, at 16 (noting schools' motivations).

assistant coaches.[16] Third, the informal networks that are used to compile candidates for coaching positions filter out minorities.[17] These informal networks unintentionally exclude minorities from consideration due to their connections and friends, in what has been called the social network theory.[18]

Social network theory proposes that "job opportunities generally arise through one's ties to other people and one's secondary ties through one's primary contacts to their networks."[19] Consequently, social networks serve to maintain traditional power structures by denying outsiders access to the elite network.[20] Kenneth Shropshire explained the phenomenon, saying that athletic directors do not consider minority candidates because when they ask their friends for recommendations, those friends often recommend their own white friends.[21] The candidates on an athletic director's "short list" often make the list because of their personal connections to the school or others in collegiate athletics.[22] The process is

16. *Id.* (explaining schools' thought processes).

17. *See id.* (stating that getting hired to coach depends on who you know); Collins, *supra* note 2, at 872 (discussing that NFL teams avoided minorities due to unconscious bias).

18. *See* Hannah Gordon, Comment, *The Robinson Rule: Models for Addressing Race Discrimination in the Hiring of NCAA Head Football Coaches*, 15 SPORTS LAW. J. 1, 5 (2008) ("Social network theory, as opposed to old-fashioned racism, is the most common explanation for the low numbers."). Social network theory is commonly referred to as the 'Old Boy' Network. *See* Collins, *supra* note 2, at 876 (discussing unconscious bias and its prevalence).

19. Gordon, *supra* note 18, at 5 (citing C. Keith Harrison et al., "SCORING THE HIRE:" A HIRING REPORT CARD AND SOCIAL NETWORK ANALYSIS FOR NCAA DIVISION IA AND IAA FOOTBALL HEAD COACHING POSITIONS IN AMERICAN HIGHER EDUCATION 19 (2006), *available at* http://graphics.fansonly.com/schools/bca/graphics/hrc/HRCfootball-06.pdf); *see also Hiring Report Card*, *supra* note 2, at 30 (describing social network theory in terms of 'hiring trees').

20. *See* Collins, *supra* note 2, at 876 (describing resulting exclusion of minorities); Shropshire, *supra* note 2, at 461 (explaining that "Ol' Boy" networks are product of unconscious racial bias); Walker, *supra* note 2, at 249 (discussing social network theory and "old boy network" hiring practices in baseball context).

21. *See* Shropshire, *supra* note 2, at 461 (describing unconscious racial motivations leading to development of social networks). Bill Walsh, a Hall of Fame football coach, described football coaching as "a very fraternal thing. You end up calling friends, and the typical coach hasn't been exposed to many black coaches." *Id.* (quoting Claire Smite, *Too Few Changes Since Campanis*, N.Y. TIMES, Aug. 16, 1992, at 1, 2). Shropshire explains that social network theory is not unique to the sports industry. *See id.* at 461-62 (discussing social networks in and outside of sports). He notes that "Jason Wright, an African American vice president at RJR Nabisco, Inc., said about the business world [that], 'The reality of life in America is that if you're white, most of the people you know are white. If someone says to you, 'Do you know anyone for this job?' the people you recommend will probably be white.'" *Id.* (quoting *Race in the Workplace*, BUS. WK., July 8, 1991 at 50).

22. Collins, *supra* note 2, at 877 (citing Jim Moye, Comment, *Punt or Go for the Touchdown? A Title VII Analysis of the National Football League's Hiring Practices for*

also present when head coaches give assistant coaching and coordinator opportunities to coaches with whom they have worked in the past.[23]

Social networks also exclude minorities because there is a substantial lack of diversity among those making the hiring decisions.[24] Subsequently, commentators believe that the dearth of minority coaches can be attributed to the scarcity of minority athletic directors.[25] In current Division I athletic ranks, there are only eleven black and four Latino athletic directors out of 120.[26] If the diversity

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Head Coaches, 6 UCLA ENT. L. REV. 105, 130-32 (1998)). Making this list is critical because only afterwards can the candidate vie for the position. *See* Ford, *supra* note 6, ¶ 18. Collins further explains:

> While it seems eminently reasonable for a decision-maker to seek the evaluation of those he or she knows and trusts when making choices from among a number of outstanding candidates, this extensive reliance on mutual friends and colleagues – i.e., other network members – operates "to exclude even those few minorities [who] have managed to surmount the more easily quantifiable barriers to access."

Collins, *supra* note 2, at 877 (quoting Charles R. Lawrence III, *Minority Hiring in AALS Law Schools: The Need for Voluntary Quotas*, 20 U.S.F. L. REV. 429, 435-36 (1986)).

23. *See Hiring Report Card*, *supra* note 2, at 17-19 (showing how assistant coaches have connections); Gordon, *supra* note 18, at 5-6 (describing coordinator job as "stepping stone" to becoming head coach); Collins, *supra* note 2, at 882 (speaking about connections for assistants in NFL and NBA). The BCA demonstrated how important connections are in its Hiring Report Card by creating a hiring tree of all the head coaches in the NFL who could trace their roots to Bill Walsh. *See Hiring Report Card*, *supra* note 2, at 17. In total, fourteen NFL head coaches, past and present, worked for Bill Walsh or someone who formerly worked for Bill Walsh. *See id.* The BCA also showed that three minority head coaches – Lovie Smith, Herman Edwards and Mike Tomlin – all worked under minority coach Tony Dungy at one point. *See id.* at 18. Doug Williams, the former head football coach at Grambling State University, said this phenomenon, "isn't really racism. It's buddy-buddy. And sometimes buddy-buddy is the same thing." Gordon, *supra* note 18, at 6 (quoting Gary Shelton, *Color Barrier*, ST. PETERSBURG TIMES, June 2, 1991, at 1C). Shropshire explains that social networks are extremely difficult to break down and overcome. *See* Shropshire, *supra* note 2, at 462. He believes that affirmative steps need to be taken to diversify networks, but that those steps are often met with resistance. *See id.* at 462-63.

24. *See Diversity Hearing*, *supra* note 12, at 16 (explaining existence of social networks). "The 2006 BCA Hiring Report stated that only 34 of 134 coaching search committee members nationwide – or 1.3 per school – were minorities." Ford, *supra* note 6, ¶ 15 (citing C. Keith Harrison, *Scoring the Hire: A Hiring Report Card and Social Network Analysis for the NCAA Division 1-A and I-AA Football Head Coaching Positions in American Higher Education*, at v (Sept. 21, 2006)).

25. *See* Gordon, *supra* note 18, at 6 (noting that ninety-four percent of athletic directors are white); Ford, *supra* note 6, ¶ 17 (noting that in 2008 there were only eleven African-American and three Latino athletic directors in Division I athletics).

26. *See Racial and Gender Report Card*, *supra* note 8, at 19 (discussing lack of minority coaching). When looking at all three divisions, Whites make up 90.0%, 92.0% and 97.0% of the athletic directors in the divisions respectively. *See id.* at 6. Blacks make up 7.2%, 3.8% and 1.8% of the athletic directors in Divisions I, II and III respectively. *See id.* Latinos made up 1.9%, 3.0% and 0% of the athletics direc-

of those hiring head coaches were to increase, some believe that the representation of minority coaches would follow.[27]

Athletic directors are not the only people responsible for hiring head coaches at colleges and universities.[28] Aside from athletic directors, university trustees, presidents, provosts, chancellors, faculty athletic representatives, and other athletic department staff members participate in the selection process.[29] Moreover, donors, politicians, alumni, conference officials, NCAA officials, the media, student-athletes, and fans can influence the hiring of a head coach.[30] The diversity of some of these groups is no better, and sometimes worse, than the diversity of coaches themselves: 92.5% of university presidents are white, while 78.3% are white males; 86.7% of athletic directors are white, while 82.5% are white males; 92.6% of faculty athletics representatives are white, while 67.2% are white males; and 100% of FBS Conference Commissioners are white and they are also all white males.[31] Although, the absence of minority head coaches cannot be directly attributed to the lack of diversity

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tors in the three divisions respectively. *See id.* Women make up 7.8%, 15.6% and 27.1% of the athletic directors in Divisions I, II and III respectively. *See id.*

27. *See* Ford, *supra* note 6, ¶ 17 (noting that external pressures athletic directors face will not lessen even with more minority athletic directors).

28. *See* Nichols, *supra* note 6, at 152 (explaining outside influence in universities' hiring).

29. *See id.* (mentioning university administrators and faculty involved in head coach hiring process). ESPN recently reported on colleges using search firms during the hiring of head football coaches. *See Chuck Neinas: College Football Headhunter* (ESPN television broadcast Aug. 28, 2009), http://espn.go.com/video/clip?id=4429850 (reporting on increasing use of search firms such as Neinas Sports Services). At this point, however, very little is known about these firms other than that there use is on the rise. *See id.* (explaining that firms are valued for keeping process confidential); *see also OTL Roundtable: Civil Rights Movement* (ESPN television broadcast Dec. 14, 2008), http://espn.go.com/video/clip?id=3768645 (including caution from Lapchick about need to investigate use of search firms).

30. *See* Nichols, *supra* note 6, at 152 (listing other university personnel involved in head coach hiring process but whose influence is harder to quantify). Brand explained that with so many parties involved in the hiring process it is hard to pinpoint, or alternatively apportion who is to blame. *See id.* (citing Charles Dervarics, *Congressional Panel Explores Options for Boosting Minorities in College Head Coaching Ranks*, DIVERSE ISSUES IN HIGHER EDUCATION, (Mar. 1, 2007), *available at* http://www. diverseeducation.com/artman/publish/article_7069.shtml).

31. *See id.* at 153 (citing Richard Lapchick, *The Buck Stops Here: Assessing Diversity Among Campus and Conference Leaders for Football Bowl Subdivision (FBS) Schools in the 2008-09 Academic Year*, TIDESPORT.ORG, Nov. 6, 2008, http://web.bus.ucf.edu/documents/sport/200809_fbs_demographics_study.pdf). Blacks made up 2.5% and Latinos 4.2% of university presidents. *See Racial and Gender Report Card*, *supra* note 8, at 3. Females made up 17.5% of university presidents. *See id.* Moreover, 83.3% of the faculties at Division I-A schools are white, while only 3.5% are black and 3.4% Latino. *See* Richard Lapchick, THE BUCK STOPS HERE: ASSESSING DIVERSITY AMONG CAMPUS AND CONFERENCE LEADERS FOR FOOTBALL BOWL SUBDIVISION (FBS) SCHOOLS IN 2008-09 ACADEMIC YEAR (2008), *available at* http://web.bus.ucf.

among those involved in the hiring process, the Black Coaches & Administrators (BCA) found that for every additional minority on a school's search committee, the number of minority candidates interviewed increases by 0.5.[32]

Some posit that boosters contribute to the diversity problem.[33] Boosters are one of an athletic program's largest donors.[34] The belief is that the decision-makers factor in the boosters' monetary contributions when they hire head coaches.[35] Former Grambling Head Football Coach, Doug Williams, explained that 'the [college] presidents and athletic directors are afraid to make decisions that might irk some of their big-time boosters.'[36] Therefore, the pre-

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edu/documents/sport/200809_fbs_demographics_study.pdf [hereinafter *The Buck Stops Here*] (listing diversity statistics of Division I-A schools).

32. *See* C. Keith Harrison et al., "SCORING THE HIRE:" A HIRING REPORT CARD AND SOCIAL NETWORK ANALYSIS FOR NCAA DIVISION IA AND IAA FOOTBALL HEAD COACHING POSITIONS IN AMERICAN HIGHER EDUCATION 7 (2006), *available at* http://graphics.fansonly.com/schools/bca/graphics/hrc/HRCfootball-06.pdf (showing impact of diverse search committees); Walker, *supra* note 2, at 270 (explaining benefits of diverse search committee); Nichols, *supra* note 6, at 153-54 (discussing reluctance to embrace mandatory minority interview policy). However, this begs the question of why college football has failed to share the same success enjoyed by college basketball in diversifying its coaching ranks.

33. *See* Bram A. Maravent, Comment, *Is the Rooney Rule Affirmative Action? Analyzing the NFL's Mandate to Its Clubs Regarding Coaching and Front Office Hires*, 13 SPORTS LAW. J. 233, 272 (2006) (describing role of boosters in university athletics); Louis, *supra* note 10, at 180-81 (asserting that boosters heavily influence athletic directors); Bram Maravent & Ben Tario, *Leveling the Playing Field: Can Title VII Work to Increase Minority Coaching Hires in NCAA Athletics?*, 81 FLA. B.J. 44, 48 (2007) (describing boosters as big hurdle).

34. *See* Maravent, *supra* note 33, at 272 (explaining that boosters help universities build stadiums, buy new equipment and pay large coaching salaries); Louis, *supra* note 10, at 181 (detailing boosters' monetary influence); Maravent & Tario, *supra* note 33, at 48 (outlining role of boosters).

35. *See* Louis, *supra* note 10, at 181 (mentioning boosters' influence).

36. Maravent, *supra* note 33, at 272 (quoting Liz Clarke, *In College Football, A Glaring Disparity; Only Two Blacks Among 117 Head Coaches*, WASH. POST, Dec. 5, 2004, at A01). Professor Gary Roberts of Tulane University Law School said,

> A head football coach . . . is much more than a football coach. He is somebody who is expected to raise a lot of money, to move gently among the alumni and be one of the good old boys. . . . There was unbelievable alumni pressure put on our president not to hire [a head coach of color], simply because they didn't want him going to the men's clubs in downtown New Orleans and mingling in a milieu where they just aren't used to black faces. . . . [T]here are so many older alumni who harken back to earlier days, who have a lot of money to give, who [teams] don't want to alienate. . . . [In] basketball it has broken down, because . . . pressures on the basketball coach are not quite the same as they are on the football coach . . . .

Collins, *supra* note 2, at 883-84 (quoting Symposium, *Is the System Flawed? Legal Ramifications of the Bowl Championship Series and Conference Alignment*, 7 VAND. J. ENT. L. & PRAC. 461, 479-80 (2005)).

sumption is that hiring a black head coach will make boosters unhappy.[37]

Other commentators do not agree that such benign forces are at play.[38] They argue that minorities are continuously excluded from head coaching positions because decision-makers persistently devalue their worth.[39] A large factor that contributes to the discounting of minorities' coaching capabilities is unconscious bias.[40] Unconscious bias is a result of categorization and stereotyping that serves to perpetuate discrimination despite the intent and awareness of the decision-maker.[41]

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37. *See* Louis, *supra* note 10, at 181 (explaining that boosters will donate less if school hires black coach). Louis believes it is necessary "when imposing a remedy . . . to keep in mind the pecuniary interests of the institutions and perhaps consider monetary penalties to teams who do not follow appropriate remedial measures." *Id.*

38. *See* Jacquelyn Bridgeman, *The Thrill of Victory and the Agony of Defeat: What Sports Tell Us About Achieving Equality in America,* 7 VA. SPORTS & ENT. L.J. 248, 256 (2008) (describing categorization and stereotyping by majority of Americans); Collins, *supra* note 2, at 874 (noting prevalence of unconscious racial bias).

39. *See* Bridgeman, *supra* note 38, at 256-57 (discussing effect of stereotypes).

40. *See id.* at 257 (describing research on unconscious bias); Collins, *supra* note 2, at 872, (arguing that Rooney Rule counters unconscious bias); N. Jeremi Duru, *The Fritz Pollard Alliance, the Rooney Rule, and the Quest to "Level the Playing Field" in the National Football League,* 7 VA. SPORTS & ENT. L.J. 179, 188 (2008) (detailing studies on prevalence and effects of subconscious discrimination and bias). Collins notes that Professor David Strauss believes unconscious bias may be more common today than conscious bias. *See* Collins, *supra* note 2, at 874 n.19 (citing David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 960 (1989)). While many people would adamantly deny that they ever act with racial animus, Charles Lawrence explains unconscious racism as follows:

> Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.

Shropshire, *supra* note 2, at 461 (quoting Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987)); *see also* Duru, *supra*, at 188 (examining unconscious bias and effect of accusations of racism).

41. *See* Bridgeman, *supra* note 38, at 257 (explaining lack of awareness of unconscious bias); *see also* Collins, *supra* note 2, at 875 (suggesting unconscious bias may be more "insidious" than conscious bias). Bridgeman explains that categorization activates stereotypes, which contain the thinker's knowledge, opinions and expectations of a particular group. *See* Bridgeman, *supra* note 38, at 265. Lu-in Wang adds that "'[t]hese processes and biases are subtle and operate largely by default.' As a result the situations that help cause and entrench discrimination are also the situations which cause us to see such discrimination as normal and correct

The devaluing of minorities' worth as football coaches often manifests itself in the subconscious stereotype that blacks do not have the intellectual capacity to be effective head football coaches.[42] Brand inadvertently summed up this consideration best when he said:

– the natural state of things – which in turn make such discrimination very difficult to identify, address, and eradicate." *Id.* at 257 (quoting LU-IN WANG, DISCRIMINATION BY DEFAULT: HOW RACISM BECOMES ROUTINE 18 (2006)). Bridgeman suggests that thinking without categorization and stereotyping is difficult because they are efficient. *See id.* at 258. But to achieve equality it is necessary to subdue them as a default practice of cognitive functioning. *See id.* at 258-59 (quoting Luin Wang, DISCRIMINATION BY DEFAULT: HOW RACISM BECOMES ROUTINE 18 (2006)). The suppression of categorization and stereotypes is important to achieve equality because they affect what we remember about other people and how we interact with them. *See id.* at 264-65. For example, unconscious bias results in differing treatment of minorities during interviews. *See id.* at 267 (citing Carl O. Word et al., *The Nonverbal Mediation of Self-Fulfilling Prophecies in Interracial Interaction*, 10 J. EXPERIMENTAL SOC. PSYCHOL. 109, 119 (1974)). Moreover, perceptions gathered from a resume as to whether a candidate is black or white affect the decision to extend an opportunity to interview. *See id.* (citing Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 1006-07 (2004)). Additionally, where qualifications are equal, yet ambiguous, a white candidate's qualifications will be treated as greater than a black candidate's. *See id.* (citing John F. Dovidio & Samuel L. Gaertner, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 PSYCHOL. SCI. 315, 318 (2000)).

42. *See* Duru, *supra* note 40, at 184 (explaining that blacks are stigmatized as intellectually inferior, which hurts coaching prospects); Collins, *supra* note 2, at 875 (noting that subconscious perceptions of intellectual inferiority persist). Collins believes that part of the reason that unconscious perceptions of intellectual inferiority persist is that those who maintain those thoughts live and work in non-diverse atmospheres. *See id.* (explaining that those who do not engage in diverse environments are only exposed to blacks who are athletes). Coaching is not the only position in football that blacks are excluded from because of perceived intellectual inferiority. *See* Jason Chung, Racial Discrimination and African-American Quarterback in the National Football League 3-4 (Nov. 29, 2004) (unpublished article, on file with author) (describing exclusion of blacks from quarterback position); Duru, *supra* note 40, at 182 (explaining that quarterback position was reserved for white players). Chung explains that there is a "stacking phenomenon" in football where black athletes are directed towards "reactive positions," whereas positions that require intellect are reserved for whites. *See* Chung, *supra*, at 3 (citing WILBERT MARCELLUS LEONARD II, A SOCIOLOGICAL PERSPECTIVE OF SPORT 275 (Burgess Publ'g Co. 1980)). Thus for a long time blacks were not considered "cerebral" enough to play quarterback. *See id.* (citing Richard E. Lapchick, Crime and Athletics: The New Racial Stereotypes of the 1990's, Center for the Study of Sports in Society (Nov. 19, 2004)). They were shifted to other positions to maximize their athletic potential. *See id.* (citing Jon Entine, *Taboo: Why Black Athletes Dominate Sports and Why We're Afraid to Talk About It*, NEW YORK: PUBLIC AFFAIRS, 277 (2000)). Lapchick shows that in 2007, only nineteen percent of quarterbacks were black, while seventy-six percent where white. *See* Richard Lapchick et al., THE 2008 RACIAL AND GENDER REPORT CARD: NATIONAL FOOTBALL LEAGUE 28 (2008) [hereinafter *NFL Report Card*] (listing racial breakdown by position). This, however, is an improvement from 1993, when ninety-three percent of quarterbacks were white. *See id.* Center, another traditionally white position, was seventy-seven percent white and eighteen percent black in 2007. *See id.* (demonstrating representation

[A] head football coach – even more so than a head basketball coach – must not only understand the complexities of the game, but they must hire and manage staff of two dozen or more, organize the development of more than a hundred student athletes into various skill units, recruit in competition with dozens of other top teams for the best available talent, appeal to alumni and donors for both athletics and campus-wide development, and often be a spokesperson for the university. And they must win![43]

Therefore, athletic directors and presidents who unconsciously believe that minorities' success in sports is attributable to innate physical ability, and not to dedication and intellect, fail to offer minorities head coaching positions, which require a high degree of intellect.[44]

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of whites and blacks in this position has not changed much since early 1990s). Traditionally black positions, such as running back and wide-receiver, have consistently been around ninety percent black and nine percent white. *See id.* Chung explains, however, that blacks were never given a chance to succeed as quarterbacks. *See* Chung, *supra*, at 4. Blacks could not succeed because when they were allowed to play as quarterbacks, coaches made them execute a run-oriented offense that was looked down upon in the NFL as too simple. *See id.* Moreover, the NFL uses intelligence tests – like the Wonderlic — that have very little predictive effect and that blacks generally score lower on. *See id.* at 6-9. Janice Madden believes, however, that historical discrimination against blacks in quarterbacking is not a cause of the underrepresentation of minority coaches. Janice Fanning Madden, *Differences in the Success of NFL Coaches by Race, 1990-2002: Evidence of Last Hire, First Fire*, 5 JOURNAL OF SPORTS ECONOMICS 6, 16 (2004) [hereinafter Madden Report] (examining what positions NFL coaches played before they coached). She found that there does not seem to be a position or set of positions that coaches formerly played. *See id.* Madden explained that eleven of the thirty-two NFL head coaches in 2002 played traditionally black positions, such as defensive back and running back, whereas sixteen of the thirty-two NFL coaches played traditionally white positions, such as quarterback, center, guard, and linebacker. *See id.* at 16-17. (see R. 1.2, 1.5, 4.1, 4.2, 16, 15, 17).

43. Press Release, National Collegiate Athletic Association, Statement of Myles Brand, NCAA President, Before the House Subcommittee on Commerce, Trade and Consumer Protection (Feb. 28, 2007), *available at* http://www2.ncaa.org/wps/wcm/connect/ncaa/NCAA/Media+and+Events/Press+Room/News+Release+Archive/2007/Official+Statements/Statement+of+Myles+Brand+NCAA+President+Before+the+House+Subcommittee+on+Commerce+Trade+and+Consumer+Protection?pageDesign=Printer+Friendly+News+Release+Detail+Layout (summarizing complexities of head coaching). Collins explored the diverging nature of diversity in the head coaching ranks between professional basketball and football. *See* Collins, *supra* note 2, at 877-79 (explaining that there is much more opportunity for minorities to become head coach in professional basketball). He attributes the divergence partly to a high degree of "organization complexity" in football. *Id.* at 878-79. Collins contends that the organizational complexity of football makes decision-makers consider intellect when making hiring decisions. *See id.* at 878.

44. *See* Collins, *supra* note 2, at 872 (explaining that lack of exposure to minorities leads to racial stereotyping). Bridgeman asserts that the integration of minorities into sports changed people's perception of minorities, at least in respect to their ability to play sports. *See* Bridgeman, *supra* note 38, at 254. She

C. The Effect on the Coaches

As a result of the glass ceiling in collegiate football, many coaches abandon collegiate positions to work in the National Football League (NFL).[45] College football is losing its most talented assistant coaches and coordinators, thereby shrinking the pool of able minority candidates for college head coaching positions.[46] For example, Jon Embree, Eric Bieniemy, Norm Chow, and Curtis Johnson are just some of the elite coaches who have left college football for greater opportunities at the professional level.[47] Working as an assistant coach or coordinator in the NFL increases the odds of becoming head coach at the collegiate level.[48] Karl Dorell, Ty Willingham, and Sylvester Croom worked as assistant coaches in the NFL before they were hired as head coaches in the FBS.[49]

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explained that previously, minorities' athletic ability, intelligence and work ethic were doubted. *See id.* Now, however, no one doubts the ability of minorities to succeed in sports. *See id.* at 254-55. Collins, however, still believes that characterization of the reasons behind an athlete's success is still divided along racial lines: white athletes are characterized as intelligent and hardworking, while black athletes' successes are attributed to natural physical ability. *See* Collins, *supra* note 2, at 876 (discussing media reports and polls on athlete characterization). Moreover, by characterizing black athletes' successes as due to natural ability it suggests that they did not earn their success, especially when white athletes are described as hardworking. *See id.* (citing Phillip M. Hoose, NECESSITIES: RACIAL BARRIERS IN AMERICAN SPORTS 19 (1989)). Kellen Winslow explained his experience with stereotyping and the different treatment he faced both as a player and as a retiree looking for a career in coaching:

> As long as I was on the field of play I was treated and viewed differently than most African-American men in this country. Because of my physical abilities, society accepted and even catered to me. Race was not an issue. Then reality came calling. After a nine-year career in the National Football League filled with honors and praises, I stepped into the real world and realized . . . I was just another nigger . . . the images and stereotypes that applied to African-American men in this country attached to me.

Duru, *supra* note 40, at 192-93 (quoting Kellen Winslow, Foreword to KENNETH L. SHROPSHIRE, IN BLACK AND WHITE: RACE AND SPORTS IN AMERICA, at xi (NYU Press 1996)).

45. *See* Ford, *supra* note 6, ¶ 49 (explaining why college coaches leave for professional football); Maravent, *supra* note 33, at 273 (encouraging adoption of Rooney Rule to prevent phenomenon).

46. *See* Ford, *supra* note 6, ¶ 49 (assessing effect on head coaching diversity in college football). If this trend continues, however, the NFL will not have the capacity to employ all the qualified coaches who choose to defect.

47. *See id.* (citing Mike Fish, *Colorado, Others Barely Make the Minority Grade*, ESPN.COM, Feb. 10, 2006, *available at* http://sports.espn.go.com/espn/blackhistory/news /story?id=2325630) (naming coaches that left college football for NFL); Maravent, *supra* note 33, at 273 (describing story of Norm Chow leaving USC for Tennessee Titans).

48. *See* Ford, *supra* note 6, ¶ 49 (noting another benefit of defecting).

49. *See id.* (quoting Mike Fish, *Colorado, Others Barely Make the Minority Grade*, ESPN.COM, Feb. 20, 2006, *available at* http://sports.espn.go.com/espn/black his-

Additionally, the lack of opportunities available to minority coaches causes former players and aspiring coaches to pursue careers outside of coaching.[50] One commentator has noted that, "[a] person is more likely to pursue a particular career path if he or she believes there is a chance for success."[51] It follows that a minority player or coach would be more optimistic about his chances to excel as a coach if he saw other minorities succeeding in that position.[52] If other minorities do not succeed as coaches, however, the phenomenon perpetuates itself; others will believe there is no opportunity for them to become successful coaches and abandon the pursuit before it begins.[53]

Because approximately half of all collegiate players are black, the dearth of minority head coaches serving as mentors for the players they lead has an affect on the student-athletes as well.[54] Commentators have demonstrated the importance of having mentors and role models that come from similar backgrounds.[55] Thus, it is important to diversify head coaching so that student-athletes have positive role models.[56]

III. THE "ROBINSON" RULE

A. "C'mon the NFL is Doing it"

Many have urged the NCAA and its member schools to adopt an equivalent of the NFL's Rooney Rule to address the lack of minority coaches in college football.[57] Dr. Richard Lapchick sug-

tory/news/story?id=2325630) (listing which coaches were able to benefit from time spent in NFL).

50. *See* Bridgeman, *supra* note 38, at 277 (describing cyclical effect of dearth of minorities in coaching).

51. *Id.* (explaining rationale behind cyclical effect).

52. *See id.* (identifying source of motivation to pursue coaching career).

53. *See id.* (conveying repercussions of cycle). Collins explains that, on the hiring side, there is a similar "catch-22": employers do not hire people from backgrounds they are unfamiliar with, but familiarity with minorities will not increase if minorities are not given an opportunity to coach. *See* Collins, *supra* note 2, at 884 (discussing factors contributing to social network theory).

54. *See* Gordon, *supra* note 18, at 5 (describing negative repercussions of lack of diversity on student-athletes); *Racial and Gender Report Card*, *supra* note 8, at 12, 33 (listing racial breakdown of student-athletes by sport).

55. *See* Gordon, *supra* note 18, at 5 (highlighting benefit of positive role models); Maravent, *supra* note 33, at 272 (arguing that need for role models for student-athletes is reason to adopt Rooney Rule).

56. *See* Gordon, *supra* note 18, at 5 (asserting reason for diversifying coaching); Maravent, *supra* note 33, at 272 (encouraging employing diverse role models for diverse students).

57. *See* Nichols, *supra* note 6, at 153-54 (describing efforts to adopted Rooney Rule equivalent in collegiate football). There are a number of individuals and

gested that the NCAA's equivalent of the Rooney Rule be called the "Robinson Rule" after Eddie Robinson, the long time head football coach at Grambling State University.[58]

The Rooney Rule originated as a result of the pressure exerted by civil rights attorneys, Johnnie Cochran and Cyrus Mehri.[59] They co-authored a report entitled "Black Coaches in the NFL: Superior Performance, Inferior Opportunities," which applied statistical analyses to demonstrate that black coaches in the NFL were being held to a higher standard.[60] The attorneys threatened to sue the NFL and its teams if the league did not take measures to correct the disparity.[61] Cochran and Mehri suggested remedial measures that the NFL could take, including the Rooney Rule.[62]

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organizations that have attempted to address the lack of diversity in head coaching positions in collegiate football. *See id.* at 155-56 (noting groups that are involved in sports in society issues). They include: the Black Coaches and Administrators, the Institute for Diversity and Ethics in Sport at the University of Central Florida, The Paul Robeson Research Center for Academic and Athletic Prowess at the University of Michigan, the Center for Equal Opportunity, and the Center for Study of Sport in Society at Northeastern University. *See id.* (listing groups that have attacked dearth of diversity coaching issue).

58. *See* Gordon, *supra* note 18, at 10 (asserting that NCAA needs Robinson Rule).

> In his fifty-seven years coaching the [Grambling] Tigers, Robinson won over 400 games, eclipsing the legendary Bear Bryant of Alabama, and is still the second-winningest college football coach of all time with an astounding 408-165-15 record. Robinson sent over 200 players to the NFL, including the first player from an HBCU to play in the NFL, Paul "Tank" Younger, and four Pro Football Hall of Famers. Moreover, over eighty percent of his more than 4000 players graduated. Today in college football less than half of black student-athletes graduate. Despite his resume, Robinson was never offered a head coaching position at a NCAA Division I school.

Id. at 2-3 (summarizing career of Eddie Robinson).

59. *See* Ford, *supra* note 6, ¶ 11 (providing origins of Rooney Rule).

60. *See* Johnnie L. Cochran, Jr. & Cyrus Mehri, BLACK COACHES IN THE NFL: SUPERIOR PERFORMANCE, INFERIOR OPPORTUNITIES 2-6 (2002) (summarizing Dr. Madden's findings on diversity in sport). Cochran & Mehri's report argued that the higher standard was discriminatory and that it dispelled the oft cited reason for racial disparity in the NFL – the pipeline. *See id.* at 6 (explaining discriminatory NFL standards for head coaches). The pipeline is "the particular set of jobs that NFL head coaches usually have preceding their appointment as coaches." *Madden Report*, *supra* note 42, at 7 (explaining pipeline is not sole explanation for under representation of minorities). Madden dispelled the pipeline explanation by demonstrating that teams required their minority coaches to be "better" than their white colleagues to be hired and then more successful to avoid being dismissed. *See id (*establishing inadequacy of pipeline justification).

61. *See* Collins, *supra* note 2, at 885 (describing Cochran and Mehri's initiative).

62. *See* Cochran & Mehri, *supra* note 61, at 14-16 (suggesting remedial measures to diversify head coaching). Cochran and Mehri proposed that teams be rewarded or penalized with draft picks based on their compliance with the rule. *See id.* at 15-16 (recommending incentives and penalties).

The NFL immediately responded by creating the Committee on Workplace Diversity, which implemented a program to promote diversity in hiring.[63] The central focus of the program was a rule that sought to increase diversity in the NFL's head coaching ranks by requiring teams to interview one minority candidate each time they conducted a search for a new head coach.[64] The Fritz Pollard Alliance later nicknamed the "Rooney Rule" after Pittsburgh

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63. *See* Press Release, National Football League, NFL Clubs to Implement Comprehensive Program to Promote Diversity in Hiring (Dec. 20, 2002), *available at* https://www.nfl.info/nflmedia/News/2002News/NFLDiversityProgram.htm [hereinafter NFL Press Release I] (describing Committee's efforts); *see also* Collins, *supra* note 2, at 886 (describing NFL's immediate response). Dan Rooney, the owner of the Pittsburgh Steelers, chaired the Committee, while Arthur Blank, Pat Bowlen, Stan Kroenke and Jeff Lurie, owners of the Atlanta Falcons, Denver Broncos, St. Louis Rams and Philadelphia Eagles, respectively, served on it. *See* NFL Press Release I, *supra* (listing owners on committee).

64. *See* NFL Press Release I, *supra* note 63 (outlining rule intended to promote diversity). The one exception to the mandatory interview is when a club previously commits contractually to promote an assistant coach from its own staff. *See id.* (explaining exception to general rule). The NFL issued guidelines to help teams comply with the rule:

> First, prior to beginning the interview process, a club should prepare a job description that clearly and fully defines the role of its head coach and the qualities it is looking for in its head coach. Second, prior to beginning the interview process, clubs should prepare a 'search timeline' that sets forth key decisions and dates leading up to the hiring of a head coach. Third, as part of the search process, clubs should make certain that they identify a deep and diverse—by many different criteria—pool of head coaching candidates. Fourth, the Committee strongly believes that direct involvement in the interviewing and selection process by a club's principal owner is very important. . . . [W]e strongly urge owners to personally contact candidates and extend invitations to interview for a club's head coaching position. Fifth, requests for permission to interview must be made and documented in accordance with the [NFL's] Anti-Tampering Policy. Sixth, invitations to interview—whether accepted or declined—should be documented directly by the club in a letter to the candidate. Seventh, telephone interviews are never preferable and seldom adequate. Eighth, it is not necessary that the same person interview each applicant. Ninth, candidates who are invited to interview for open positions should do so. Any widespread refusal . . . should be brought to the attention of the [NFL] Commissioner or his senior staff. Finally, for a range of reasons, we strongly question the value of head coaching changes during the season. However, if a coaching change is made during the season, the club may name an interim coach from its existing staff for the remainder of the season without going through a formal interviewing process. However, the club must follow the mandatory interviewing process in choosing a new permanent head coach.

Press Release, National Football League, NFL Issues Interviewing Guidelines (Dec. 9, 2003), *available at* http://origin.nfl.com/news/story/6908387 [hereinafter NFL Press Release II] (providing guidelines so teams can comply with rule in good faith). Shortly thereafter, Cochran and Mehri created the Fritz Pollard Alliance, an affinity group designed to promote equal opportunity in the NFL, to ensure that the NFL and its teams complied with the adopted recommendations. *See* Collins, *supra* note 2, at 887 (noting that group could be plaintiff in Title VII action).

Steelers owner and chair of the NFL Committee on Workplace Diversity, Dan Rooney.[65]

If a team violates the Rooney Rule, the NFL has the power to sanction the team's general manager and the team itself.[66] The power to discipline noncompliant teams makes the rule very effective.[67] Paul Tagliabue, former Commissioner of the NFL fined, Matt Millen, general manager of the Detroit Lions in 2003 because he failed to comply with the Rule while hiring head coach, Steve Mariucci.[68] Since then, no team has dared to violate the

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65. *See* Collins, *supra* note 2, at 886 n.89 (explaining naming of rule). In describing Commissioner Tagliabue's selection of Dan Rooney as chair of the Committee, Cummings said, "Tagliabue turned to the one NFL club owner who had the clout and wherewithal to effectuate the kind of change needed to address the race problem in the NFL. Dan Rooney . . . commanded respect amongst his fellow owners . . . ." Cummings, *supra* note 3, at 118 (describing Rooney's qualifications to lead committee). Major League Baseball implemented its own diversity policy before the NFL in 1999. *See* Walker, *supra* note 2, at 249 (explaining creation of guiding principles within Major League Baseball). The policy requires teams to consider minorities for upper-level positions and each time a team hires a new manger, it must submit a list of minority candidates to the league for review. *See id.* (describing specific conditions of policy). The NFL recently expanded the Rooney Rule to cover openings for team general managers and other front-office positions. *See* Mark Maske, *NFL Expands Rooney Rule to Cover Front-Office Hires*, WASH. POST, June 16, 2009, http://www.washingtonpost.com/wpdyn/content/article/2009/06/15/AR2009061502806.html (describing application of mandatory interview rule to front-office positions).

66. *See* Maravent, *supra* note 33, at 242 ("Commissioner Tagliabue made sure to note that 'conduct inconsistent with procedural or substantive initiative relating to equal employment opportunity may be treated as conduct detrimental' to the NFL's Constitution and Bylaws, and therefore subject to punishment."); Ford, *supra* note 6, ¶ 11 (clarifying commissioner's power to penalize teams that violate rule); Collins, *supra* note 2, at 871 (detailing that NFL considers noncompliance to be detrimental conduct and violation of league's constitution and bylaws).

67. *See* Ford, *supra* note 6, ¶ 11 (describing power to penalize).

68. *See* Maravent, *supra* note 33, at 243 (explaining background behind Millen's fining); Ford, *supra* note 6, ¶ 11 (summarizing Tagliabue's punishment of Millen). Millen's fining "provoked considerable criticism." Collins, *supra* note 2, at 871. Critics found it particularly unfair that Millen was fined when he made a concerted effort to interview a minority, but the minorities he reached out to declined interviews. *See* Maravent, *supra* note 33, at 265-68 (illustrating why some found punishment unreasonable).

> Millen contacted five minority prospects regarding the Lions vacancy, but all five refused his interview invitation because they knew that the decision to hire Mariucci had already been made. As Millen hastily continued his search to conduct an obligatory minority interview, he worried that Mariucci would receive other offers. Fearful that he would lose a hot commodity, Millen decided to forego the Rule and signed Mariucci. Subsequently, the NFL fined Millen $200,000, informing him of the penalty in a letter from then commissioner Tagliabue. The correspondence stated that "[w]hile certain of the difficulties that [Millen] encountered in seeking to schedule interviews with minority candidates were beyond [his] control, [he] did not take sufficient steps to satisfy the commitment that [he] had made."

Rooney Rule[69]

The Rooney Rule has helped diversify head coaching in the NFL.[70] There are currently six minority head coaches in the NFL, and since the Rule's enactment, there have been as many as seven minority head coaches in the NFL at one time.[71] Moreover, since

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Collins, *supra* note 2, at 900-01 (describing less known background of Millen fining) (citations omitted). Others, however, have a different telling of the Millen fining; Gene Upshaw, the executive director of the Players Association, said "[t]he Detroit Lions gave mere lip service to the agreed-upon minority hiring process, treating it almost as if a nuisance to their hiring of Steve Mariucci. The minority candidates were never given a fair chance to interview. In this case, the Lions' position is indefensible." Maravent, *supra* note 33, at 243 (quoting Associated Press, *Lions' Millen Fined $200K for Not Interviewing Minority Candidates*, CBS.SPORTS LINE.COM, July 25, 2003, http://cbs.sportsline.com/print/nfl/story/6498949).

69. *See* Louis, *supra* note 10, at 203 (describing impact of Millen's fining); *See* Ford, *supra* note 6, at ¶ 11 (noting other teams subsequent full compliance).

70. *See* Collins, *supra* note 2, at 872 (describing Rooney Rule as not perfect but successful); Nichols, *supra* note 6, at 5, 157-58 (summarizing impact of Rooney Rule); Ford, *supra* note 6, ¶ 11 (discussing increased diversity among NFL head coaches). Many believe that the Robinson Rule will be equally successful in diversifying collegiate football. *See* Louis, *supra* note 10, at 205-06 (illustrating other potential ways to diversify athletics). Some commentators believe that the Rooney Rule has achieved unparalleled success. *See* Nichols, *supra* note 6, at 158-59 (describing incomparable achievement of rule); Collins, *supra* note 2, at 908-09 (noting that it is still controversial). Others, however, argue that the Rooney Rule is not responsible for the increases in diversity seen around the league. *See* Nichols, *supra* note 6, at 157 (highlighting contradictory opinions) (citing Mike Sando, *Lewis Felling the Heat, Belichek a Cut Above*, Feb. 12, 2008, http://sports.espn.go.com/nfl/columns/story ?columnist=sando_mike&id=3242034 (highlighting contradictory opinions). "Those who subscribe to that view point out that eight of the last nine hires in the NFL and sixteen of the last nineteen have gone to white coaches and that one of the three recent minority hires was fired after only a single season on the job." *Id.* at 158. Supporters of the Rooney Rule counter saying that from 1950 to 2003, only six minorities were hired as NFL head coaches, but since 2003, eight minorities have been hired. *See id.* at 158-59 (arguing Rooney Rule is responsible for increased diversification). Moreover, they argue that the rule has led to an unprecedented amount of interviews for minority candidates allowing them to break down barriers to previously all white networks. *See* Collins, *supra* note 2, at 910 (mentioning previously all white head coaching network).
This author believes the success of the Rooney Rule needs to be viewed with caution. While it is undeniable that the rule has led to increases in the amount of minority coaches hired, this author posits that the rule needs more time for its effects to ripen before it can be called an unparalleled success.

71. *See generally* National Football League, http://www.nfl.com/ (last visited Oct. 31, 2009) (containing information on minority head coaches of Cincinnati Bengals, Indianapolis Colts, Pittsburgh Steelers, Chicago Bears, San Francisco 49ers and Tampa Bay Buccaneers); *see also* Ford, *supra* note 6, at 91 (discussing representation of black coaches in NFL). Before the rule was enacted there were two black coaches in the NFL and only five black coaches in the history of the NFL. *See* Interview with Dr. Janice Fanning Madden, Professor of Sociology, Wharton School of Business University of Pennsylvania, in Phila., Pa. (Mar. 2, 2009) [hereinafter Madden Interview]; *NFL Report Card*, *supra* note 42, at 18. Since the rule's passing, teams hired ten new black coaches: Marvin Lewis, Lovie Smith, Romeo Crennel, Dennis Green, Herman Edwards, Art Shell, Mike Tomlin, Jim Caldwell, Mike Singletary and Raheem Morris. *See* National Football League, *supra* (supply-

the rule's adoption, three black coaches led teams to the Super Bowl; prior to the Rooney Rule, however, no minority coach ever reached the Super Bowl.[72] In the most recent Super Bowl, Mike Tomlin, minority head coach of the Pittsburgh Steelers, became the youngest coach ever, black or white, to win the Super Bowl.[73]

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ing information concerning new hires within NFL); Cummings, *supra* note 3, at 27-29 (noting impossibility of predicting how many would be hired without rule but probability it would not be this many).

The rule has also increased diversity among assistant coaches and front-office executives. *See* Nichols, *supra* note 6, at 157 (showing changes to other positions as result of rule). In 2001, twenty-eight percent of assistant coaches in the NFL were black; in 2007, thirty-six percent of assistant coaches were black. *See NFL Report Card, supra* note 42, at 19 (providing racial breakdown by position). Moreover, in 2008, the NFL had five black general managers, whereas in 2001 the league only had two. *See id.* at 21 (illustrating vast difference in diversification of positions between specified years). Nichols noted that New York Giants general manager, Jerry Reese, became the first black general manager to win a Super Bowl. *See* Nichols, *supra* note 6, at 158 (discussing significance of this milestone).

72. *See* Black Coaches and Administrators, *Mike Tomlin Is Coach of the Week!*, Feb. 12, 2009, http://bcasports.cstv.com/genrel/021209aaa.html [hereinafter *Tomlin Coach of the Week*] (illustrating impact of Rooney Rule); Black Coaches and Administrators, *Tomlin Becomes Youngest Coach to Win Super Bowl*, Feb. 2, 2009, http://bcasports.cstv.com/genrel/020209aaa.html [hereinafter *Tomlin Youngest Coach*] (discussing Steelers' Super Bowl victory); Phil Taylor, *Don't Discount Impact of African-American Coaches*, SI.COM, Jan. 31, 2007, http://sportsillustrated.cnn.com/2007/ writers/phil_taylor/01/31/coaches/index.html (reporting on significance of two black coaches reaching Super Bowl).

73. *See Tomlin Youngest Coach, supra* note 73 (remarking that President Obama called Tomlin to congratulate him). Some tried to diminish Tomlin's success when he was first hired, claiming that Dan Rooney, the rule's creator, was pressured into hiring him. *See* Collins, *supra* note 2, at 909 (citing *Were Others 'Ruled' Out by Rooney?; Did the Rooney Rule Play a Part in Tomlin's Hiring as Steelers Coach?*, PITT. POST-GAZETTE, Jan. 23, 2007, at D-1) (noting critics of Tomlin's accomplishment); *see also Tomlin Youngest to Win, supra* note 73 (explaining how former Steelers' assistant coaches Ken Wisenhunt or Russ Grim were expected to get position). The media rumor was that Commissioner Goodell pressured Rooney to hire Tomlin or Chicago Bears defensive coordinator, Ron Rivera. *See* Collins, *supra* note 2, at 909 n.227 (citing Posting of Mike Florio to http://www.profootballtalk.com/1-16-07through1-31-07.htm (Jan. 30, 2007) (tracing gossip that circulated as result of hiring). Rooney, as well as Tomlin, deny the rumor. *See id.* (rejecting rumor allegations). In talking about the role the Rooney Rule played in Tomlin's hiring Rooney himself said:

> To be honest with you, before the interview he was just another guy who was an assistant coach. Once we interviewed him the first time, he just came through and we thought it was great. And we brought him back and talked to him on the phone and went though the process that we do, and he ended up winning the job. [The rule] wasn't the most important thing because he was the most important thing. Mike got the job because he showed us his ability and showed us what he could do, and we believed in him.

Cummings, *supra* note 3, at 126-27 (describing Rooney's involvement in hiring Tomlin) (citing Greg Garber, *Thanks to Rooney Rule, Doors Opened*, ESPN.COM, *available at* http://sports.espn.go.com/nfl/playoffs06/news/story?id=2750645).

B. The NCAA Tries to Pull a Fast One?

Proposals suggesting that college football adopt a rule equivalent to the Rooney Rule have met tremendous resistance.[74] Brand has led much of that battle.[75] In opposing the Robinson Rule, Brand asserted that the Robinson Rule could not be applied to colleges and universities.[76] Specifically, he said that the NCAA lacked the power to regulate whom its member institutions interviewed and hired.[77] While speaking before Congress, Brand alleged that the NCAA could not regulate its schools as such because "they are not about to cede authority and give up their autonomy to the NCAA . . . to dictate . . . who they will interview in coaching . . . ."[78] Moreover, he contended that independent monitoring of schools' hiring practices was the best approach to achieve diversity.[79] Brand said that the BCA's Hiring Report Card acts as the NCAA's "operational equivalent" to the Rooney Rule.[80]

While speaking before Congress, Brand argued that the NCAA could not impose the Robinson Rule on schools, however, he took a different approach at the NCAA Convention: "Individual institutions are wholly responsible for the hiring of coaches and administrators. That is as it should be. No outside body, such as the NCAA, should usurp the authority or responsibility of universities and col-

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74. *See* Nichols, *supra* note 6, at 160-63 (explaining that NCAA has most power to invoke change but has not utilized it); *see also* Ford, *supra* note 6, at ¶ 12 (describing resistance from NCAA).

75. *See Diversity Hearing, supra* note 12 at 16-17 (noting resistance of potential adoption of similar rule).

76. *See id.* (asserting that NCAA cannot control member schools in this respect).

77. *See* Nichols, *supra* note 6, at 16 (limiting NCAA's control) (citing Myles Brand, *Presidents' Forum – Hiring in Athletics – Expect More Scrutiny if Diversity Data Don't Improve*, Apr. 23, 2007, http://www.ncaa.org/wps/ncaa?ContentID=256) (limiting NCAA's control; *see also* American Council on Education, *House Subcommittee Conducts Hearing on Diversity in College Coaching Ranks*, ACENet.edu, Mar. 2, 2007 (reporting congressional hearing).

78. *Diversity Hearing, supra* note 12 at 15 (describing member schools' position).

79. *See id.* (referring to independent "Report Cards").

80. NCAA Press Release, *supra* note 43 (applauding BCA's work). The BCA's Hiring Report Card is supposed to make school's hiring processes more transparent and accountable. *See Hiring Report Card, supra* note 2, at 15 (expressing purpose of report card). Nichols believes, however, that the hiring report cards do little more than embarrass schools and do not have great promise to invoke change. *See* Nichols, *supra* note 6, at 156 (disagreeing with accountability of report cards). Floyd Keith admits that even though some schools are cooperating with the BCA, minority hiring has not improved. *See Hiring Report Card, supra* note 2, at 10 (illustrating negative results).

leges in hiring."[81] Both claims, however, are erroneous.[82] The NCAA, while being a voluntary association of schools, is a 'major power in formulating rule changes and in setting and policing the procedures under which members operate their football programs . . . .'[83] Consequently, the NCAA plays a fundamental role in regulating the conduct of its member institutions, their employees, supporters, and student-athletes.[84] Although, the NCAA regulates broad areas of conduct such as academic eligibility, recruiting, and scholarships, it also micro-manages member institutions by regulating the use of team logos, printing of student-athlete playing cards, and acceptance of collect calls from recruits.[85] Therefore, the NCAA refuses to regulate interviewing and hiring of coaches, not because it does not have the authority, but because it is an unpopular initiative among its constituents.[86] The NCAA hides behind the excuse of institutional autonomy, thus dodging responsibility.[87]

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81. Nichols, *supra* note 6, at 161 (quoting Myles Brand, *State of the Association – 'Citizens in a Civil Society'*, Jan. 15, 2007, http://www.ncaa.org/wps/ncaa?ContentID= 40976). Brand also said, "The NCAA only has the authority the membership gives us, and the membership has not given us that kind of authority – nor do I expect they will. That makes us dramatically different than the NFL." Gordon, *supra* note 18, at 11 (quoting Tony Barnhart, *Croom: Minority Hirings 'Can't Get Worse'*, ATL. J. CONST., Feb. 19, 2008, http://www.ajc.com/uga/content/sports/stories/2008/02/18/ncaa_0219. html).

82. *See* Nichols, *supra* note 6, at 161-62 (describing Brand's position as shortsighted).

83. *Id.* at 149 (citing College Football Encyclopedia, *Introduction: A Brief History of College Football*, http://www.footballencyclopedia.com/cfeintro.htm (last visited Oct. 31, 2009)).

84. *See* Gordon, *supra* note 18, at 11-12 (describing NCAA regulations as "seemingly infinite"); *see also* Nichols, *supra* note 6, at 161-62 (summarizing NCAA's regulatory power).

85. *See generally* The Nat'l Collegiate Athletic Ass'n, 2008-09 NCAA DIVISION I MANUAL (2008), *available at http://www.ncaapublications.com/Uploads/PDF/Division_1_Manual_2008-09e9e568a1-c269-4423-9ca5-16d6827c16bc.pdf* (describing regulatory power of NCAA). Gordon adds:

> The NCAA arguably usurps the authority of its member institutions by regulating everything from how long their teams can practice, to whether and how they may give a game program to a recruit, to whether and how they can go on foreign tours, to their postseason bowl licensing and financial administration. The NCAA even keeps pace with technology, expediting its rule-making process to pass a ban on text messages from coaches or recruits, updating the NCAA's existing limits on personal, mail, and telephone contact.

Gordon, *supra* note 18, at 12 (providing examples of NCAA regulation).

86. *See* Gordon, *supra* note 18, at 12 (calling Brand's explanations "insincere"); Nichols, *supra* note 6, at 161 (saying Brand is avoiding responsibility).

87. *See* Nichols, *supra* note 6, at 161 (asserting NCAA could regulate hiring but is unwilling).

Brand, however, was not the only leader of the fight against the Robinson Rule.[88] University presidents and athletic directors objected to the Robinson Rule as well.[89] T.K. Wetherell, the President of Florida State University, said he was 'not sure you can legislate morality.'[90] Kevin White, Duke University's Athletic Director, believed it would be difficult to administer the rule procedurally: "You have public schools, private schools, different rules and regulations in different states."[91]

Dutch Baughman, Executive Director of the Division I-A Athletic Directors' Association, declared that the Robinson Rule was contrary to 'institutional prerogative.'[92] Additionally, Baughman asserted that the NCAA did not need a Rooney Rule equivalent, as there was sufficient evidence of progress.[93] He noted that the number of minority candidates interviewed for head coaching positions jumped from two to twenty in two years.[94] There would have been more, Baughman explained, had twelve candidates not declined the opportunity to interview.[95]

Despite the resistance, in January of 2008, Baughman and the Athletic Directors' Association issued guidelines for hiring head coaches.[96] The guidelines, similar to the Rooney Rule, provide that

88. *See id.* at 153 (explaining reluctance of university presidents and athletic directors).

89. *See id.* at 153-54 (noting that administrators seem unconcerned with problem).

90. *Id.* at 154 (citing Wendell Barnhouse, *Worst NCAA Football Score Ever: 5% of Coaches are Black*, FORT WORTH STAR-TELEGRAM, May 17, 2008) (showing lack of effort to support Robinson Rule).

91. *Id.* (including responses to proposed rule by presidents and athletic directors).

92. *Id.* (citing Michael Rothstein, *Groups Fight for College to Hire Minorities*, FORT WAYNE JOURNAL-GAZETTE, Dec. 16, 2007). Nichols explains that NFL owners almost certainly believed their institutional prerogative was being impaired when adopting the Rooney Rule, but did so anyway. *See id.* at 154.

93. *See id.* (setting forth Baughman's position).

94. *See id.* (quoting Interview with Dutch Baughman, Executive Director of the Division 1A Athletic Directors' Association (May 27, 2008)). Brand reformulated this data to show that between 2004 and 2007, seventy-six percent of FBS schools interviewed at least one minority candidate. *See id.*

95. *See id.* (quoting Interview with Dutch Baughman, Executive Director of Division 1A Athletic Directors' Association (May 27, 2008)) ("Two years ago, there were two minority candidates for a head football coaching position interviewed. This past December, there were twenty candidates interviewed, six declined interviews, and six from the NFL declined interviews. The program is working, but we still have much to do, two new minorities were hired.").

96. *See* Mark Maske, *Diversity Rule Goes to College*, WASH. POST, Feb. 8, 2008, at E1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/02/07/AR 2008020704232.html (summarizing adopting of Athletic Directors' Association guidelines). Now, Baughman changed his tune and said, 'I really, truly believe it's the right thing to do.' Steve Weiberg, *Minority-Hiring Policy Stiffens for*

athletic directors, at Division I-A schools, should interview at least one minority candidate while seeking to fill a head coaching vacancy.[97] Additionally, the guidelines request that schools maintain a list of diverse candidates, even when there is no vacancy.[98] The guidelines, however, fall short of the envisioned Robinson Rule because they lack an enforcement mechanism.[99] Without penalties

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Major Football Programs, USA TODAY, Jan. 16, 2009, http://www.usatoday.com/sports/college/football/2008-01-15-Minorityhiring_N.htm.

97. *See* Maske, *supra* note 96 (identifying similarities of new guidelines to Rooney Rule). The guidelines state:

> Athletic Directors interviewing candidates for head football coaching positions should include, one or more minority candidates for that position, resulting in a formal interview opportunity. It is prudent to hire from a broad, diverse, and growing group of candidates, and to support equal opportunity and fair hiring practices throughout the hiring process. This is not only the position of the Association, but most likely in alignment with the hiring policies of the institutions.

Division I-A Athletics Directors' Association, ACCEPTABLE STANDARDS 2 (2009), *available at* http://i.usatoday.net/sports/college/football/fbc-minority-hiring-guidelines. pdf [hereinafter *Athletic Directors' Guidelines*]. Nichols notes that the policy uses the word "should" instead of "must" which allows athletic directors to ignore the rule if they choose. *See* Nichols, *supra* note 6, at 156 (analyzing whether guidelines create requirement or suggestion).

98. *See Athletic Directors' Guidelines*, *supra* note 97, at 1 (advising schools to conduct their program in accordance to proposed policy). This part of the guidelines states:

> Historically, the identification of candidates for a new search begins at the start of the process, which potentially results in a less-than-comprehensive group of candidates. It is prudent to ensure a list of potential candidates will include minority coaches. The development of the diverse group of candidates should be an on-going procedure during the normal course of business throughout the year, and in particular, at times other than when an actual search is underway. This on-going procedure should enable the Athletic Directors to identify a more diverse group of candidates, well in advance of when a search is necessary. Athletic Directors are encouraged to develop a list of potential candidates, to specifically include minority candidates, which will enhance the efficiency of a search process, but will also give the Athletics Director more time to personally become better acquainted with those coaches identified as potential candidates, before an actual search is necessary.

Id.

99. *See* Maske, *supra* note 96 (explaining Athletic Directors' Association Guidelines); Weiberg, *supra* note 96 (explaining policy has no penalty for noncompliance). For further discussion of the Rooney Rule's enforcement mechanism, see *supra* notes 66-69 and accompanying text. Louis points out that the ability to fine a university for violating the rule is critical because schools will not feel obligated to comply otherwise. *See* Louis, *supra* note 10, at 203-04 (emphasizing importance of ability to penalize such conduct). Gordon adds that the rule lacks force simply because the Athletics Directors' Association is an unknown relative to the NCAA. *See* Gordon, *supra* note 18, at 11 (pointing out reason for weakness in rule).

for noncompliance, the Athletic Directors' Association's guidelines are merely a suggestion.[100]

The Athletic Directors' Association guidelines originated during a meeting between the Fritz Pollard Alliance and Brand; again, the Alliance urged the NCAA to adopt the Robinson Rule.[101] Brand directed the Alliance to work with Baughman and the athletic directors in adopting an equivalent to the Rooney Rule.[102] The Athletic Directors' Association, however, is unable to punish schools that refuse to comply with the rule.[103] It is unclear whether the NCAA thought it could evade responsibility by pressuring the Athletic Directors' Association into adopting the rule, specifically because it does not have the power to penalize noncompliance.[104] Nevertheless, while the athletic directors have been congratulated for "tak[ing] ownership of the issue," the rule has been, and will likely remain, ineffective.[105]

C. Criticism of the Rule

The Rooney Rule has its opposition.[106] It has been labeled unfair, inefficient, flawed, subterfuge and reverse discrimina-

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100. *See* Wieberg, *supra* note 96 (mentioning criticism of guidelines). Baughman responded to suggestions that the guidelines were ineffective without penalties by saying 'I have a lot more professional trust in our folks than that.' *Id.* (describing Baughman's defense of guidelines).

101. *See* Maske, *supra* note 96 (providing background of guidelines' inception).

102. *See id.* (describing Fritz Pollard Alliance's involvement).

103. *See id.* (addressing restriction of Athletic Directors' Association's power to enforce guidelines). Collins interestingly discusses possible amendments to the Rooney Rule that the NCAA could adopt that would not require punishment but would still ensure compliance:

> The [NCAA] could consider . . . implement[ing] an incentive-based system rather than [a] . . . penalty-based rule, which substantially interferes with [schools'] organizational autonomy. An incentive program could provide an effective means of countering hiring biases with a minimum of unintended collateral consequences while also eliminating the threatening, commandeering nature inherent in a penalty-based system.

Collins, *supra* note 2, at 911 n.233 (considering amendment to Rooney Rule).

104. *See* Maske, *supra* note 96 (questioning motive behind NCAA's inquisition).

105. *See id.* (discussing praise offered to athletic directors); *Racial and Gender Report Card*, *supra* note 8, at 7; *Hiring Report Card*, *supra* note 2, at 10 (arguing despite this recognition, rule is nevertheless unproductive).

106. *See* Jay Nordlinger, *Of the Rooney Rule, Classically Black, and Other Distinctively American Outrages*, NAT'L REV. ONLINE, Sept. 2, 2003, http://www. nationalreview.com/impromptus/impromptus090203.asp (acknowledging distaste for rule); Hub Arkush, *Honorable Intentions Aside, 'Rooney Rule' is Unfair*, PROFOOTBALLWEEKLY.COM, Dec. 20, 2004, http://www.profootballweekly.com/PFW/ Commentary/Columns/2004/harkush1924.htm (claiming rule is unreasonable); Eric Edholm, *Lions' President was Made Example of for NFL's Flawed 'Rooney Rule'*,

tion.[107] Much of the criticism focuses on whether it leads to sham interviews.[108] Critics believe that when teams already know who they want to hire, interviewing a minority is a waste of time and potentially embarrassing for the minority.[109] Lapchick counters

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PROFOOTBALLWEEKLY.COM, Aug. 1, 2003, http://www.profootballweekly.com/PFW/ Commentary/Columns/2003/edholm080103.htm (disapproving of rule).

107. *See* Arkush, *supra* note 106 (noting perceived defects in rule);Edholm, *supra* note 106 (criticizing Rooney rule); Collins, *supra* note 2, at 871-72; Cummings, *supra* note 3, at 34 (describing critics' opinions). Proponents, however, are adamant that the Rooney Rule is not reverse discrimination, but rather a widening of the recruitment networks. *See* Shropshire, *supra* note 2, at 467 (predicting necessary response to critics of affirmative action in sports). They emphasize that there is no instruction to lower the standard of merit for the person being hired. *See id.* at 467-68 (rebutting criticisms of Rooney rule).

108. *See* Nordlinger, *supra* note 106 (recognizing existing racial troubles despite implementation of rule); Gordon, *supra* note 18, at 10 (recognizing sham interviews); Maravent, *supra* note 33, at 248 (discussing interviews can be wasting time for teams and interviewer); Collins, *supra* note 2, at 901-02 (criticizing Rooney Rule); Duru, *supra* note 40, at 194-95 (explaining difficulty of ensuring team complies with rule in good faith). Collins is critical of the rule and believes that it leads to perfunctory interviews when a well-established candidate is under consideration. *See* Collins, *supra* note 2, at 901-02. But a minority who otherwise might not have been given the chance to interview previously may impress the decision-makers and truly compete for the position despite his lesser-known status. *See* Gordon, *supra* note 18, at 11 (theorizing origin of criticism).

Collins describes a story, which he believes demonstrates the weakness of the rule:

> In a 2003 scheme illustrating the folly of the system, John Hackney, an African American with an MBA from Cornell, offered to come and interview with any NFL team for $100,000. While he had no interest in being an NFL head coach, Hackney reasoned that he could pocket $100,000, and the NFL team would have a net savings of $100,000 by complying with the Rule and thereby avoiding a $200,000 fine such as the one issued against Millen.

Collins, *supra* note 2, at 903 n.194 (citing Marianne M. Jennings, *Rush Limbaugh: Part I*, JEWISH WORLD REV., Oct. 5, 2003, http://www.jewishworldreview.com/cols/jennings 1011503.asp). It is clear, however, that a team that employed Mr. Hackney's services would not be making a good faith effort at complying with the Rooney Rule and would likely be fined anyway. *See id.* (defending Detroit Lions actions in hiring Mariucci).

109. *See* Gordon, *supra* note 18, at 10 (giving Detroit Lions desire to hire Steve Mariucci from outset as example); *see also* Collins, *supra* note 2, at 902 (arguing that rule promotes tokenism); *see also* Cummings, *supra* note 3, at 35 (explaining criticism of rule). The NCAA officially signed on to this position recently calling mandatory interviews 'tokenism' and 'belittling.' Posting of Myles Brand to NCAA Double-A Zone, http://www.doubleazone.com/2009/06/to_rooney_or_not_to_rooney_diversity_hiring_college_football.php#comments (June 5, 2009, 14:51 EST) (including Charlotte Westerhaus's thoughts regarding Rooney Rule). Collins believes situations like the hiring of Bill Parcells by the Dallas Cowboys and Nick Saban by the Miami Dolphins are the scenarios where the Rooney Rule fails. *See* Collins, *supra* note 2, at 902 (demonstrating when rule is ineffective). Cumming responds, however, by saying:

> Those critics that claim that pro forma interviews by owners with majority head coaching candidates in mind (i.e. Steve Mariucci in Detroit and Bills Parcells in Dallas) badly miss the point of the Rooney Rule. Occasionally, a minority candidate will eschew an interview opportunity for a

that many of the minorities interviewed would not have had such an opportunity without the rule.[110] Additionally, he posits that teams allow minorities to earn the job by impressing them, which is an opportunity otherwise unavailable without the interview.[111] Moreover, safeguards like the NFL's requirement that teams act in good faith when complying with the Rooney Rule, protect against sham interviews.[112]

> head coaching positions that seems predetermined to go to a majority candidate. The decision to refuse an interview on this basis is short sighted as well. The Rooney Rule is about exposure. The more an NFL owner knows about a candidate, majority or minority, the more likely (or unlikely) it is that that candidate will be hired by that owner in the future. The hiring bias that existed (and still exists) in the NFL is based primarily on lack of exposure. No interview, no matter how unlikely it will end in a job offer, should be considered "sham" if a minority candidate is being exposed to an NFL owner and that owner is becoming familiar with that minority candidate.

Cummings, *supra* note 3, at 130 (responding to criticism of rule).

110. *See* Maravent, *supra* note 33, at 270-71 (measuring success of rule); *see also* Collins, *supra* note 2, at 906 (declaring that process of interviewing minorities was crucial); *see also* Duru, *supra* note 40, at 195 (explaining that rule leads to "meaningful consideration" and breaking down of unconscious bias).

111. *See* Maravent, *supra* note 33, at 270-71 (crediting Rooney rule for increase in minorities); Collins, *supra* note 2, at 904-07 (explaining how rule provides opportunities for minorities and why challenges to rule will most likely fail). Coaches are hurt by the absence of the Rooney Rule in college athletics because of the increased visibility it provides minority candidates. *See* Nichols, *supra* note 6, at 161 (awarding credit to diversification that rule creates). Not only do minority candidates get a chance to try and impress a school, but even if they do not get hired initially, their name gets spread as a qualified candidate who warrants consideration. *See* Collins, *supra* note 2, at 906-07 (noting that rule allows minorities to develop reputation among decision-makers). Collins explains:

> [T]here may be instances where a candidate – previously a specialist assistant coach (i.e., linebackers coach) – interviews for a head coaching position and winds up instead with an offer for a lower, but still highly coveted, coordinator position (i.e., defensive coordinator). Accepting the offer not only results in a promotion, but it significantly increases his chances of becoming a head coach in the future.

Id. at 906-07 (footnotes omitted) (noting example of Jason Garret). This increased visibility helps coaches whittle away at the perception that they are unqualified and increases the odds of them being hired in the future. *See* Nichols, *supra* note 6, at 159-60 (proposing benefits of increased visibility). That is how, Cummings notes, the Rooney Rule "has significantly impacted the real and subconscious barriers that had been erected as obstacles in the paths of African American and minority coaches." Cummings, *supra* note 3, at 106 (discussing effect of Rooney Rule).

112. *See NFL Press Release II*, *supra* note 64 (tracing steps necessary to comply with rule). Even though teams are required to act in good faith, it is difficult to actually monitor teams and schools in this regard. *See Hiring Report Card*, *supra* note 2, at 32 (itemizing complexities of rule).

IV. THE PROSPECT OF LITIGATION

A. Threats Made and Intentions Stated

When Johnnie Cochran and Cyrus Mehri submitted their report to the NFL in 2002, they informed Commissioner Tagliabue that unless the league acted soon, legal action would follow.[113] Floyd Keith, Executive Director of the BCA, made a similar threat to the NCAA in 2007.[114] The NCAA's response has been weak as it lacks visible results.[115] Therefore, it seems as though the NCAA has called the BCA's bluff.[116] Lapchick, however, believes that legal action is imminent.[117] Regardless of whether legal action is imminent, it is a real threat with potential for success.[118]

B. Title VII

Title VII provides a legal remedy for discriminatory hiring.[119] Congress passed the Civil Rights Act (the Act) in 1964 to eradicate prejudice, hate, and discrimination in the United States.[120] Title

113. *See* Cummings, *supra* note 3, at 117 (addressing that Cochran and Mehri did not make suggestion but rather, conveyed threat); Collins, *supra* note 2, at 885 (introducing Cochran and Mehri's threat of class action lawsuits). Collins notes that the idea of Title VII suits against the NFL were considered even before Mr. Cochran and Mr. Mehri threatened the NFL. *See id.* at 884 n.76 (discussing Sherman Lewis's inability to get interview). A group of black coaches discussed filing a Title VII lawsuit after Sherman Lewis, the offensive coordinator for the 1995 Super Bowl champion Green Bay Packers, could not get an interview for a head coaching job. *See id.* (illustrating risk of potential litigation) (citing Jim Reeves, Op-Ed, *Lewis Merits a Chance at Cowboys Job*, FORT WORTH STAR-TELEGRAM, Jan. 22, 1998, at D1).

114. *See* Maravent & Tario, *supra* note 33, at 45 (drawing similarity to previous threat); Gordon, *supra* note 18, at 8 (discussing Keith and Lapchick's statements at Congressional hearings); Ford, *supra* note 6, ¶ 1 (illustrating NCAA's lack of action). 'I think it's pretty clear that embarrassment hasn't been enough. One of the things we're thinking about is Title VII lawsuit.' *See* Maravent & Tario, *supra* note 33, at 45 (citing Associate Press, *Lack of Black Coaches Lamented at Hearing*, ESPN.COM, Mar. 1, 2007, *available at* sports.espn.go.com/espn/print?id=2783335&type=story). Keith also said that '[h]istory has proven that in order for any significant progress to be made in eradicating a social injustice, legal action has been a catalyst for change.' Gordon, *supra* note 18, at 8 (quoting Associated Press, *Lack of Black Coaches Lamented at Hearing*, ESPN.COM, Feb. 28, 2007, http://sports.espn.go.com/ncf/news/story?id=2783335).

115. *See* Nichols, *supra* note 6, at 161 (conveying NCAA response to legal threat).

116. *See id.* (observing that NCAA barely responded).

117. *See* Ford, *supra* note 6, ¶ 9 (mentioning Lapchick's thought on potential litigation).

118. *See* Maravent & Tario, *supra* note 33, at 48 (theorizing that if suit is not successful it will at least pressure NCAA to consider best practices models).

119. *See* Gordon, *supra* note 18, at 6 (summarizing background of Title VII).

120. *See id.* (articulating purpose of Civil Rights Act); *see also* H.R. Rep. No. 88-914, at 2 (1963). The other acts Congress passed to address employment discrimination include: the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2006); the Age

VII of the Act prohibits employer discrimination against employees and potential employees.[121] Employers may not discriminate on the basis of race, color, religion, sex or national origin "with respect to . . . compensation, terms, conditions, or privileges of employment . . . ."[122] Moreover, an employer may not use race, color, religion, sex, or national origin in a way that adversely affects an employee's status or deprives an employee or potential employee of an employment opportunity.[123] Thus, the purpose of Title VII is to "remov[e] . . . artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[124]

The two types of discrimination recognized under the Act are disparate treatment and disparate impact.[125] Disparate treatment occurs when an "employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in

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Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (2006); the Rehabilitation Act of 1973, 29 U.S.C. §§ 791-794 (2006); and the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2006).

121. *See* 42 U.S.C. § 2000e-2(a) (2006) (discussing provision of Title VII of Act).

122. *Id.* (explaining language of statute). Subsection (1) states that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Id.*

123. *See id.* (imposing restrictions on use of language). Subsection (2) states that it is unlawful for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." *Id.* Maravent & Tario explain the meaning of adverse employment action by quoting case law:

> To establish sufficiently adverse employment action, a plaintiff must show a serious and material change in the terms, conditions or privileges of employment. Although the statute does not require any direct economic consequences, the employer's action must impact the terms, conditions or privileges of the plaintiff's job in a real and demonstrable way, and the asserted impact cannot be speculative and must at least have a tangible adverse effect on the plaintiff's employment. [T]he employee's subjective view of the significance and adversity of the employer's action must be materially adverse as viewed by a reasonable person in the circumstances.

Maravent & Tario, *supra* note 33, at 46 (quoting Davis v. Town of Lake Park, 245 F.3d 1232, 1238 (11th Cir. 2001) (explaining adverse employment action standard) (internal citations and quotations omitted).

124. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (reasoning of Title VII).

125. *See* Gordon, *supra* note 18, at 6 (explaining Title VII litigation).

treatment."[126] Disparate treatment is split into two categories: individual and systemic.[127] Under individual disparate treatment, the plaintiff coach must prove that he was treated differently because of his race.[128] Under systemic disparate treatment, the coach must prove that he was among a class of workers that were treated differently from another class.[129]

The Supreme Court created a burden-shifting analysis for disparate treatment cases in *McDonnell Douglas Corp. v. Green*.[130] Under this analysis, a plaintiff must make a prima facie showing of discrimination.[131] To make out a prima facie case for discrimination, the plaintiff coach must show: (1) that he was part of a protected class; (2) that he applied and was qualified for a coaching job for which the employer was seeking applicants; (3) that despite his qualifications he was rejected; and (4) that after he was rejected, the coaching position remained open and the employer continued to seek applicants that had the same qualifications.[132]

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126. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (defining disparate treatment and disparate impact) (citation omitted). *See generally* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (claiming violation of provision of Civil Rights Act of 1964); *see also* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) (alleging employer discriminated against them on basis of race); *see also* Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 248 (1981) (asserting claims based on circumstances in which plaintiff was denied promotion and fired because of her gender); *see also* Patterson v. McLean Credit Union, 39 F.3d 515, 519 (4th Cir. 1994) (asserting claim in connection with employer's promotion of less-senior white employee); *see also* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 527 (1993) (providing examples of employment action that qualify include being hired, fired, promoted or demoted).

127. *See* Nichols, *supra* note 6, at 165 (laying out background of disparate treatment analysis).

128. *See id.* (explaining potential Title VII claims for intentional discrimination).

129. *See id.* (listing required elements for showing of systemic disparate treatment). Systemic claims are often established with both statistics and anecdotal evidence of discrimination. *See id.* (quoting Davis v. Valley Hospitality Servs., 372 F. Supp. 2d 641, 656 (M.D. Ga. 2005), *aff'd*, 214 Fed. Appx. 877 (11th Cir. 2006)).

130. 411 U.S. 792 (1973).

131. *See id.* at 802 (setting out elements of prima facie case).

132. *See id.* at 802 (naming elements under plaintiff's burden). In establishing a prima facie case of discrimination, the plaintiff serves to exclude the two most obvious explanations an employer might proffer for denying a potential employee: lack of qualifications and open positions. *See* Maravent and Tario, *supra* note 33, at 46 (explaining that framework is set up to require demonstration that employment action was not taken for meritorious reasons). The elements in the *McDonnell Douglas* prima facie case can be adjusted for non-hiring situations that involve discrimination. *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993) (applying McDonnell Douglas framework to discharge and demotion); Tolbert v. Briggs and Stratton Corp., 510 F. Supp. 2d 549, 556 (M.D. Ala. 2007) (implementing McDonnell Douglas framework in promotion context); Siddiqi v. New York City Health & Hosps. Corp., 572 F. Supp. 2d 353, 365 (S.D.N.Y. 2008)

If the plaintiff coach meets this burden, then the defendant university must provide a legitimate, non-discriminatory reason for its decision.[133] The school need not demonstrate that it was motivated by this reason when it made the hiring decision.[134] Nevertheless, the university must proffer a reason that was available at the time of hiring.[135] This burden is light because the defendant only needs to offer a non-discriminatory reason, rather than prove that the reason was its motivation.[136] A college or university can point to any number of legitimate non-discriminatory reasons for not hiring the coach; legitimate reasons may include "past coaching experience, recruiting ability, ability to connect with university sponsors and donors, proven ability to handle the media [and] education level attained."[137]

If the university meets its burden, the presumption of discriminatory hiring will be rebutted.[138] Once the defendant university satisfies its burden of production, the coach may still prevail by proving that the reason offered was pretext or that the university's discriminatory intentions were more likely than not the motivation

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(employing McDonnell Douglas framework in claim for discrimination in terms and conditions).

133. *See McDonnell Douglas*, 411 U.S. at 802-03 (detailing shifting burden). The employer must present nondiscriminatory explanations, however, "[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons." Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981) (citing Bd. of Trs. of Keene State Coll. v. Sweeney, 439 U.S. 24, 25 (1978). Rather, "[i]t is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Id.* Nevertheless, the defendant must "produc[e] a reason that was available to it at the time of the decision's making." Turnes v. AmSouth Bank, 36 F.3d 1057, 1061 (11th Cir. 1994). The Supreme Court temporarily shifted the burden of proof in establishing nondiscriminatory excuses and justifications to the employee in Wards Cove Packing Co. v. Antonio. 490 U.S. 642 (1989). The Court held that the burden of persuasion must remain with the plaintiff at all times and he must prove that the discriminatory practice is attenuated from a business justification. *See id.* at 644 (noting need for burden of persuasion). Congress, however, saw the holding as too limiting and overruled it in the Civil Rights Act of 1991. Pub. L. No. 102-166, 105 Stat. 1071 (1991). Thus, the Civil Rights Acts of 1991 reinstated the *McDonnell Douglas* burden of proof structure. *See id.* (adopting structure of *McDonnell Douglas*).

134. *See Burdine*, 450 U.S. at 254 (explaining burden shifting). "The defendant need not persuade the court that it was actually motivated by the proffered reasons." *Id.* (quoting Bd. of Tr. of Keene State Coll. v. Sweeny, 439 U.S. 24, 25 (1978).

135. *See Turnes*, 36 F.3d at 1061 (requiring employers to produce reason that was available to it at time of decision making).

136. *See* Perryman v. Johnson Prods. Inc., 698 F.2d 1138, 1142 (11th Cir. 1983) (deeming shifted burden for rebuttal as exceedingly light).

137. Nichols, *supra* note 6, at 170 (offering potential legitimate, nondiscriminatory reasons for not hiring coaching candidate).

138. *See Burdine*, 450 U.S. at 255 (detailing litigation tactics for Title VII suit).

behind the decision.[139] If the university does not offer a legitimate non-discriminatory reason for rejecting the plaintiff, the trier of fact may infer that it unlawfully discriminated against the coach.[140]

A plaintiff coach may prove systemic disparate treatment if the university maintains a policy that requires it to treat employees of a certain class worse than others.[141] Alternatively, and more commonly, systemic disparate treatment claims are established using statistics that demonstrate the difference in treatment of a class of which the plaintiff is a part.[142] A plaintiff coach would use statistics produced by expert testimony to prove that the university engages in a pattern or practice of discrimination.[143]

Defendants in Title VII claims may assert an affirmative defense to disparate treatment – the bona fide occupational qualification (BFOQ).[144] Employers may raise the BFOQ defense when accused of discrimination based on sex, religion and national ori-

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139. *See McDonnell Douglas*, 411 U.S. at 804; *see also Burdine*, 450 U.S. at 253, 256 (indicating further options for plaintiff to prove claims of discrimination).

140. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) (addressing ability of fact finder to find intentional discrimination if defendant's contrary reasons are rejected). A trier of fact is required to rule in the plaintiff's favor if he satisfies the prima facie case and the defendant does not produce a legitimate, nondiscriminatory reason for rejecting her. *See id.* at 509 (stating court's responsibility). If reasonable minds could differ on whether the plaintiff has demonstrated the prima facie case by a preponderance of the evidence, then the trier of fact must resolve the question of fact. *See id.* at 509-510 (clarifying court's role in factual dispute).

141. *See* Nichols, *supra* note 6, at 167 (noting proposed liability under systemic disparate treatment); *see also* Gordon, *supra* note 18, at 7 (setting forth plaintiff's litigation options).

142. *See* Nichols, *supra* note 6, at 169 (introducing doctrine allowing statistical proof of discrimination); *see also,* Gordon, *supra* note 18, at 7 (commenting that usage of statistical analysis is common practice). Plaintiffs may use statistics to prove the discriminatory effects of an employer's action in both systemic disparate treatment and disparate impact claims. *See* Louis, *supra* note 10, at 188 (emphasizing use of statistics as litigation strategy) .

143. *See* Nichols, *supra* note 6, at 169 (describing necessary tools to use statistical proof in court); *see also* Gordon, *supra* note 18, at 7 (highlighting role of statistics and statistical experts). A plaintiff may use direct or circumstantial evidence to prove discrimination under Title VII. *See* U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 n.3 (1983) (referencing applicable evidentiary rule for plaintiff). Most Title VII plaintiffs, however, use circumstantial evidence due to the difficulty of finding direct evidence. *See* Louis, *supra* note 10, at 187 (summarizing common litigation practices).

144. *See* 42 U.S.C. § 2000e-2(e) (2008) (detailing that BFOQs necessary to success of institutions are acceptable). The Act states that it is not unlawful "for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise . . . ." *Id.*

gin, but not race or color.[145] Consequently, universities and colleges may not utilize the BFOQ defense in a Title VII action brought by a black coach claiming racial discrimination.[146]

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145. *See* Knight v. Nassau County Civil Serv. Comm'n, 649 F.2d 157 (2d Cir.), *cert. denied*, 454 U.S. 818 (1981) (interpreting 42 U.S.C. § 200e-2(e)). The Court has held that because "[r]ace is conspicuously absent from the exception; the bare statute could lead one to conclude that there is no exception for either intentional or unintentional racial discrimination." Miller v. Tex. State Bd. of Barber Exam'rs, 615 F.2d 650, 652 (5th Cir. 1980). In the legislative history of the Act Senators Joseph S. Clark and Clifford P. Case said of the BFOQ defense:

> [It] is limited right to discriminate on the basis of religion, sex, or national origin where the reason for the discrimination is a bona fide occupational qualification. Examples of such legitimate discrimination would be the preference of a French restaurant for a French cook, the preference of a professional baseball team for male players, and the preference of a business, which seeks the patronage of members of particular religious groups for a salesman of that religion.

H.R. Doc. No. 7152, 88th Cong., 2d Sess., 11 Cong. Rec. 7213 (1964).

146. *See* 42 U.S.C. § 2000e-2(e) (2008) (providing BFOQ defense only in cases involving discrimination on basis of sex, religion and national origin). Courts consistently hold that customer preference, in this case the fan preference, is an inadequate rationale for asserting a BFOQ defense. *See generally* Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir. 1971) (alleging employer violated Civil Rights Act by refusing to hire plaintiff because of his gender); Gerdom v. Continental Airlines, Inc., 692 F.2d 602 (9th Cir. 1982) (claiming sexual discrimination because airplane policy required female flight attendants to comply with strict weight requirements); Lam v. Univ. of Haw., 40 F.3d 1551 (9th Cir. 1994) (claiming law school discriminated in application process on basis of race, sex and national origin); Rucker v. Higher Ed. AIDS Bd., 669 F.2d 1179 (7th Cir. 1982) (contending Higher Educational Aids Board fired him because he refused to obey his superiors in their efforts to discriminate on racial and sexual grounds); Fernandez v. Wynn Oil Co., 653 F.2d 1273 (9th Cir. 1981) (arguing employment discrimination because of her gender). The customer preference rationale is unacceptable because courts recognize that the Act tried to alter customer prejudices. *See Diaz*, 442 F.2d at 389 (explaining that it was goal of Act to overcome prejudices of sexual discrimination). The Fifth Circuit explained:

> [I]t would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether . . . discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome. Thus, we feel that customer preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers.

Id. Furthermore, Equal Employment Opportunity Commission (EEOC) guidelines state that "the refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers" does not warrant a BFOQ. 29 C.F.R. § 1604.2(a)(1)(iii) (2009). Consequently, an argument by universities and colleges that the discrimination was in response to fan preferences would quickly be rejected as a BFOQ rationale, even if the Title VII claim were not race-based. The burden of proof for the BFOQ defense lies with the employer. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989) (explaining burden of proof in BFOQ case). There are two parts to the defense; to satisfy the first part, the employer must show that the purpose of the restriction is related to the "essence" or "central mission" of the business. UAW v. Johnson Controls, Inc., 499 U.S. 187, 203 (1991) (describing two prongs of defense). Thus, the employer must show that sex, religion or national origin is essential to the performance of the job in which the potential employee is being denied. *See* Trans World Airlines, Inc. v.

Disparate impact "involve[s] employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another."[147] The Supreme Court first construed the Act to proscribe disparate impact in *Griggs v. Duke Power Co.*[148] The Court found that "practices, procedure, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[149] Therefore, discriminatory employment practices, albeit unintentionally so, are unlawful under Title VII.[150]

Thurston, 469 U.S. 111, 122 (1985) (dissecting burden of proof for employer in BFOQ case). To satisfy the second part, the employer must demonstrate that the means used are closely related to the essence of the business; therefore, the employer must show that those excluded were unable to perform the job safely and effectively, or that it would have been impractical to assess the qualifications of those excluded on an individual basis. *See* W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 414 (1985) (citing Weeks v. S. Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969)) (noting employees burden).

147. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, n.15 (1977). *See generally Griggs*, 401 U.S. at 424 (alleging that employment practices violated Civil Rights Act as employers conduct discriminated against black employees); Dothard v. Rawlinson, 433 U.S. 321 (1977) (challenging height and weight requirements and regulation establishing gender criteria for assigning correctional counselors); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (defining meaning of disparate impact in case setting). Disparate impact is important as a mechanism for establishing liability because the prevalence of unconscious bias makes it difficult to show discriminatory intent. *See* Collins, *supra* note 2, at 875 (explaining that focus on intent does not address common discriminatory behavior). Therefore, focusing solely on intent would be ill advised. *See id.* (concluding that beyond intent, historical patterns of cultural or behavioral bias are significant).

148. 401 U.S. 424 (1971). In *Griggs*, the defendant employer instituted a policy requiring employees to have a high school diploma and receive satisfactory scores on two aptitude tests in order to transfer between departments. *See id.* at 427-28 (disseminating fact of case). There was no evidence of intent to discriminate on the part of the employer, however, the policy served to exclude black employees from transferring. *See id.* at 432 (opining that education requirements in 1970's disadvantaged blacks from certain employment opportunities).

149. *Id.* at 430. The Court found that these neutral practices must be outlawed because "[t]he objective of Congress in the enactment of Title VII. . .was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Id.* at 429-30.

150. *See id.* at 429-31 (holding that employment practices must be nondiscriminatory); *see also* Nichols, *supra* note 6, at 164 (explaining that requirements may be found unlawful if excludes persons of certain racial group more than others). A coach may find it difficult to bring a claim asserting social network theory is a Title VII violation under disparate treatment and impact. *See* Ford, *supra* note 6, at 90 (discussing difficulty in prevailing on this claim). Ford explains that in *EEOC v. Consol. Serv. Sys.*, the Seventh Circuit found that 'word of mouth recruiting does not compel and inference of intentional discrimination,' nor is it an employment practice under disparate impact theory. *Id.* (*quoting* EEOC v. Consol. Serv. Sys., 989 F.2d 233, 236 (7th Cir. 1994)). Ford notes, however, that there are "jurisdictions that consider word of mouth recruiting and employment practice." *Id.*

A plaintiff coach establishes a prima facie case under disparate impact theory by showing that the defendant university uses an employment practice that causes a disparate impact.[151] If the coach makes out the prima facie case for disparate impact, then the university will either attempt to rebut the claim or demonstrate that the employment practice has a "manifest relationship to the job in question."[152] If the defendant university meets that burden, then the coach has the opportunity to prove that the university could have achieved the same purpose by alternative means that would not result in one class suffering a disparate impact.[153]

C. Statistical Proof of the Prima Facie Case

Most commentators who have analyzed the black coaches' hiring woes cite one statistic more than any other: 55% of student football players are black, yet only 5% of their coaches are as well.[154]

Therefore, a plaintiff's ability to allege discrimination based on social network theory will depend on what jurisdiction the suit is filed in. *See id.* (noting that jurisdiction is important in discrimination cases).

151. *See* 42 U.S.C. § 2000e-2(k) (outlining burden of proof in disparate impact cases).

152. EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264, 1281 (N.D. Ill. 1986). The Supreme Court established business necessity, the affirmative defense to disparate impact in *Griggs*. *See* 401 U.S. at 424 (articulating affirmative defense to disparate impact). The Court developed this doctrine because "[t]he act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.* at 431. Therefore, the employer must show that the "employment practice" is "related to job performance," or else it "is prohibited." *Id.* Business necessity is established by satisfying three requirements: "(1) the practice must identify qualities that have a 'manifest relationship to the employment in question'; (2) the compelling business need of using the practice must outweigh the discriminatory impact; and (3) there must be no other practice that could accomplish the same business purpose with less discriminatory impact." Leslie S. Gielow, Note, *Sex Discrimination in Newscasting*, 84 MICH. L. REV. 443, 467 (1985) (citations ommitted). Business necessity does not apply to instances of intentional discrimination. *See* Garcia v. Gloor, 609 F.2d 156, 163 (5th Cir. 1980), *cert denied*, 449 U.S. 1113 (1981) (distinguishing business necessity defense from BFOQ defense); *see also* Pettway v. Am. Cast Iron Pipe Com., 494 F.2d 211, 244 (5th Cir. 1974), *reh'g denied*, 494 F.2d 1296 (5th Cir. 1974), *cert. denied*, 439 U.S. 1115 (1979) (discussing employer's defensive burden of proof).

153. *See Sears, Roebuck & Co.*, 628 F. Supp. at 1281 (*citing* Dothard v. Rawlinson, 433 U.S. 321, 329 (1977)) (explaining employer's burden to prove plaintiff's proof is inaccurate or insignificant); *see also* Gordon, *supra* note 18, at 8 (assessing plaintiff's ability to argue that discrimination was not business necessity).

154. *See* Ford, *supra* note 6, at 88 (noting large discrepancy in representation in race between students and coaches); *see also* Louis, *supra* note 10, at 190 (comparing, for example in 2006, proportion of black players to black coaches in college football); *Hiring Report Card, supra* note 2, at 11 (comparing representation in collegiate football to representation in collegiate basketball and U.S. Army). These statistics represent Division I-A. Other commentators frame the problem starkly by pointing out that "only twenty-six minorities have ever held collegiate head football coach positions among the several thousand times such a position

While this statistic may help draw attention to the underrepresentation of black head coaches in collegiate football, it has no legal significance when raised in a Title VII claim.[155]

Statistical proof of discrimination, however, will be critical to a coach's Title VII case against a university.[156] Consequently, during litigation, there will undoubtedly be debate over what is the appropriate applicant pool from which head coaches are selected.[157] Determining the parameters of the applicant pool is important in any employment discrimination case because a plaintiff can make out the prima facie case for intent to discriminate simply by showing that the plaintiff's class is severely underrepresented relative to the class's representation in the local labor force.[158]

To determine whether there is a statistically significant disparity, the court must first decide if the position at issue should be classified as an unskilled or skilled job.[159] If the job is unskilled, the court must compare minority representation in the employer's workforce to minority representation in the area labor market or general population.[160] If the position is skilled, however, the court

has opened since 1869 (or even since the NCAA was formed in 1910)." Nichols, *supra* note 6, at 170. Although this statistic is not completely up to date, even if it were, it could not be used because the relevant periods of hiring that must be analyzed are those subsequent to the passing of Title VII.

155. *See* Gordon, *supra* note 18, at 7 (arguing that underrepresentation of black coaches has social significance but not legal significance); Collins, *supra* note 2, at 895 (explaining that players and coaches occupy distinct labor markets). Part of the problem with relying on this statistic is that not every athlete becomes a coach, nor does every athlete desire to. *See* Shropshire, *supra* note 2, at 458 (measuring validity of statistic). In *Teamsters*, the Court used the general population as a control group for statistical comparison. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, (1977) (noting general public as appropriate). In *Hazelwood*, however, the Court found that when skilled positions are at issue, the general population was the inappropriate control group. *See Hazelwood*, 433 U.S. at 313 (opining need for more specific control group). Consequently, in *Hazelwood* the parties fought over what would be considered the appropriate group. *See id.* at 313 (holding that statistical data concerning labor market area should have been included). Therefore, the Court determined that in cases involving skilled positions the appropriate control group is the qualified labor market. *See id.* at 313 (explaining proper analysis). Either way students are the wrong control group because they are not even in the labor market. *See Int'l Bhd. of Teamsters*, 431 U.S. at 324 (cautioning that statistical data can be counterproductive if not sufficiently related to case at hand).

156. *See Int'l Bhd. of Teamsters*, 431 U.S. at 338 (concluding that statistics have valued role in discrimination cases); *Hazelwood*, 433 U.S. at 307-08 (emphasizing ability of statistics to provide proof in employment discrimination suits).

157. *See Hazelwood*, 433 U.S. at 310-11 (outlining that what statistics prove depends on information against which they are analyzed).

158. *See id.* at 311-12 (establishing relevant labor market test).

159. *See id.* at 309, n.13 (distinguishing skilled position of teaching in present case from unskilled position of driving trucks in prior case of *Teamsters*).

160. *See id.* (requiring that comparison must be drawn to like populations).

must compare the percentage of minorities in the defendant's workplace with the number of qualified employees in the area labor market.[161]

Undoubtedly, head coaching would be considered a skilled position, but many commentators differ in their opinions as to which candidates within the coaching world should be considered qualified.[162] Bridgeman simply defined the employment pool as all coaches nationwide that are qualified to be head coaches.[163] Hannah Gordon and Daniel Louis believe that it should include all assistant coaches.[164] Dr. Janice Madden contends that the pool should be defined by objective performance data that would indicate that an assistant coach or coordinator could succeed as a head coach.[165]

While possible, it is unlikely that a court would force the plaintiff coach to use local labor force data and not allow the coach to use the national coaching labor market as its relevant comparison group.[166] Consequently, a plaintiff might need to compile statistical data of the hiring practices of the individual defendant school.[167] That data, however, may be difficult to ascertain and in some cases, such data may be nonexistent.[168]

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161. *See id.* (opining that if defendant is skilled worker he must be compared to workers with comparable skills).

162. *See* Bridgeman, *supra* 38, at 262 (exploring what qualifies coach to become head coach); Gordon, *supra* note 18, at 7 (speculating on comparison group); Louis, *supra* note 10, at 190 (discussing gateway positions to head coaching).

163. *See* Bridgeman, *supra* note 10, at 262 (asserting belief for appropriate labor market comparison).

164. *See* Gordon, *supra* note 18, at 7 (narrowing inclusion of assistant coaches because more black men are included).
"[T]he labor market for college head coaches primarily consists of assistant coaches; the pool of assistant coaches is 23% African-American so we expect in a nondiscriminatory 'ideal treatment' world that 23% of head coaches would be African American." *Id.*; *see also* Louis, *supra* note 10, at 172, 190 (noting that in 2005 this was 26.52% of pool). Walker wrongly suggested that the appropriate comparison group would be head coaches in other sports. *See* Walker, *supra* note 2, at 255 (arguing that proportion of minority coaches in baseball would be compared to NBA and NFL in suit against MLB).

165. *See* Madden Interview, *supra* note 72 (illustrating how performance data can be used to assess who will succeed as head coach).

166. *See* Louis, *supra* note 10, at 192 (evaluating possible outcomes of statistical approach in court).

167. *See id.* (explaining alternative discovery method).

168. *See id.* (noting that employers often do not maintain data of hiring process). Madden explains, however, that this can work against the employer because "employers are often hurt when they do not maintain hiring data." Madden Interview, *supra* note 72.

If a court limits the plaintiff coach's use of available statistical data, the coach may need to look beyond hiring data to prove disparate treatment.[169] Included in Cochran and Mehri's report to the NFL was a report by Dr. Madden, entitled "Differences in the Success of NFL Coaches by Race, 1986-2001: Evidence of Last Hire, First Fire" (Madden Report).[170] The Madden Report statistically analyzed win and loss data during the relevant period for coaches who served their team for a full season.[171] Madden concluded that from 1986 to 2001 black coaches outperformed their white counterparts, averaging more than nine wins, as compared to eight by white coaches.[172] Madden emphasized that this was particularly important because teams with nine wins were much more likely to make the playoffs than teams with eight.[173] This disparity led to sixty-nine percent of teams with black coaches making the playoffs, as opposed to forty percent of teams with white coaches.[174]

Furthermore, Madden found that black coaches who were fired performed better in their final season than white coaches who

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169. *See* Louis, *supra* note 10, at 192 (providing alternate methods of proof).

170. Cochran and Mehri, *supra* note 61, at 2-6 (including *Madden Report* to demonstrate discrepancy in treatment).

171. *See* Madden Report, *supra* note 42, at 8 (analyzing performance data).

172. *See id.* at 15-16 (explaining that during relevant period black coaches had better record than white coaches). Madden's study controlled for team quality to demonstrate that black coaches were not only succeeding because they had better teams. *See id.* at 13-14. (finding Black coaches performed just as well as white coaches). She controlled for quality through previous records and team payroll. *See id.* (discussing methodology of Madden's analysis). Duru explains that from this data "Mehri and Cochran did not conclude that black head coaches were somehow inherently better than white head coaches. Rather, they concluded that because barriers to entry were formidable for black coaches seeking head coaching positions than for white coaches, the black coaches able to surmount those barriers were exceedingly well equipped to succeed as head coaches." Duru, *supra* note 40, at 188 (reviewing findings in Cochran and Mehri report). *See also* Madden Report, *supra* note 42, at 9 (comparing season records). Madden also demonstrated that black coaches performed better in their first season as head coach than white coaches. *See id.* at 11 (comparing winning percentages of coaches from both races). Black coaches won an average of 9.6 games in their first season, whereas white coaches won 7.1 games in their first season. *See id.* at 10 (examining statistical facts). Seventy-one percent of black coaches made the playoffs in their first season, while only twenty-three percent of white coaches did. *See id.* (drawing attention to black coach's superior playoff percentages).

173. *See id.* at 9 (highlighting importance of having nine wins during football season). "[D]uring this time period over 60% if teams with exactly nine wins made the playoffs, but less than 9% of those with eight wins did so." *Id.*

174. *See id.* at 9-10 (drawing attention to discrepancy in tendency to reach playoffs). "All of the African American coaches have made it to the playoffs, but only 48 of 77 White coaches made it to the playoffs between 1990 and 2002." *Id.* at 10.

were fired.[175] Black coaches averaged 6.8 wins in their final season before being fired, where as white coaches averaged only 5.5 wins.[176] Moreover, twenty percent of fired black coaches made the playoffs in their final season, but only eight percent of white coaches did the same.[177]

Ultimately, Madden concluded that the numbers were consistent with higher expectations for black coaches.[178] Therefore, although hiring data for a lawsuit brought by a minority coach might be unavailable, performance data might suffice.[179] If the results in the Madden Report exist in college football and minority coaches are being held to a higher standard, then this constitutes evidence of employment discrimination.[180] Either way, a plaintiff who buttresses anecdotal evidence of discrimination with statistical evidence of systemic disparate treatment will greatly improve his odds of success.[181]

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175. *See id.* at 9, 11-12 (demonstrating that black coaches performed better in their last season with team). Madden noted that because she had data for all the coaches that could be fired in a season, it permitted her to perform a more direct test to determine whether black coaches were more likely to be fired based on their performance. *See id.* at 12 (utilizing accurate data). She concluded that "African American coaches are significantly more likely to be fired than White coaches, controlling for their regular-season performance and their time with their teams." *Id.*

176. *See id.* at 11-12 (contending that blacks had to perform better to avoid dismissal).

177. *See id.* at 12 (comparing playoff achievements of black and white coaches). If this phenomenon were to exist in college football a coach could bring a Title VII action for discriminatory firing. Many believe that Ty Willingham was subject to such treatment during his dismissal from Notre Dame. *See* Gary Norris Gray, *Tyrone Willingham vs. Charlie Weis: An Honest look at Notre Dame Football Three Years Later*, BLACKATHLETE.NET, Oct. 25, 2008, http://blackathlete.net/artman2/publish/ College_Football_22/Tyrone_Willingham_Vs_Charlie_Weis.shtml (speculating possible reason for Willingham's dismissal).

178. *See* Madden Report, *supra* note 42, at 15 (discussing findings). Madden cautioned that her sample size was small. *See id.* at 12 (detailing parameters of analysis). Nevertheless, a small sample size may independently be proof of discriminatory intent because with less minority head coaches it will be easier to demonstrate legally significant disparities. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 341-42 n.23 (finding that when statistical data is so small that significant findings cannot be made it is in and of itself proof of discriminatory intent as "inexorable zero").

179. *See* Duru, *supra* note 40, at 188 (advocating for multiple strategies using statistics). Madden used win-loss data, which was and always will be readily available. *See generally* Madden Report, *supra* note 42 (analyzing performance through team records).

180. *See* Duru, *supra* note 40, at 188 (asserting evidence in Madden's report will suffice in Title VII claim).

181. *See id.* at 188 (describing NFL's response to statistical evidence).

D. Title VII Myths

Many commentators have wrongly assumed that a Title VII action brought by a coach will fail without "smoking gun evidence."[182] The odds of a case having direct evidence, such as an athletic director explaining to a minority candidate that he was not hired because of his race, are unlikely.[183] Employers, including those in collegiate athletics, have become more careful and do not leave "smoking guns" lying around.[184] Nevertheless, the *McDonnell Douglas* framework allows plaintiffs to prove a prima facie case of intent to discriminate without such evidence.[185] Moreover, as noted above, statistical data can be used to prove a prima facie case of intent to discriminate.[186] A plaintiff's burden to prove a prima facie case of discrimination is not difficult and can be done without any "smoking gun evidence."[187]

Another misconception of Title VII requirements is that a disparate impact claim by a coach will fail because schools do not use standardized hiring practices when hiring coaches.[188] As a result of the decision in *Watson v. Forth Worth Bank & Trust*, disparate impact theory is not limited to objective hiring practices, but also applies to

182. *See* Louis, *supra* note 10, at 187 (noting that candidate who was not formerly employed by school will have little or no evidence of discriminatory animus or deliberate treatment because he simply has not had substantial relationship with that school); Ford, *supra* note 6, at 98, 102 (explaining that it would be hard to proceed on disparate treatment claim without evidence of deliberate discrimination); Maravent and Tario, *supra* note 33, at 48 (quoting Telephone Interview with Temple University Beasley School of Law Professor Jeremi Duru (Mar. 20, 2007)); Walker, *supra* note 2, at 253 (instructing that it will be extremely difficult to prevail without explicit comments).

> [M]ore often than not, employment discrimination plaintiffs do not have iron clad, smoking gun . . . evidence. At best, an applicant might have evidence of what the Court calls a 'stray remark' . . . . [S]tray remarks . . . are far from dispositive. Because of the limited probative vale given to stray remarks an the sheer lack of other substantial evidence for a Black applicant head coach, it is very difficult to prove even a prima facie case of intentional discrimination in a failure-to-hire situation.

Louis, *supra* note 10, at 191-92 (arguing that disparate impact claims are best).

183. *See* Ford, *supra* note 6, at 90 (citing Steve Weiberg, *Black Coaches Association Will Use Title VII as Tool in Encouraging Diversity in NCAA*, USA TODAY, Sept. 5, 2006, http://www.usatoday.com/sports/college/football/2006-09-05-title7ncaa_x.htm) (reporting Black Coaches Association plans to use Title VII to increase diversity with NCAA).

184. *See* Louis, *supra* note 10, at 187, 191 (discussing improbability of finding direct evidence).

185. *See supra* notes 131-33 and accompanying text.

186. *See supra* notes 155-62 and accompanying text.

187. *See* Maravent and Tario, *supra* note 33, at 46 (analyzing *McDonnell Douglas* framework); Collins, *supra* note 2, at 894 (describing burden as light).

188. *See* Ford, *supra* note 6, at 97 (asserting disparate impact claims can challenge validity of only objective tests).

subjective hiring practices.[189] Therefore, a black coach alleging disparate impact could assert that the university's subjective hiring practices have a disparate impact on qualified minority candidates.[190] This is particularly important because diversification of the coaching ranks may require an objectification of hiring procedures.[191]

E. *Jackson v. University of New Haven* as Guidance

In 2002, the United States District Court of Connecticut decided *Jackson v. University of New Haven*.[192] James Jackson, a football coach who applied for the head coach position at the University of New Haven, brought Title VII claims for disparate impact and disparate treatment.[193] When advertising the position, the University listed "successful collegiate coaching experience" as a requirement.[194] Additionally, the University required "experience in recruiting, game coaching and knowledge of NCAA rules and regulations."[195] Jackson was one of thirty-six applicants for the head coaching position at the University.[196] He previously served as a minor league professional football coach.[197] His credentials also included multiple "coach of the year" honors in minor league professional football, as well as induction into the Minor League Football Hall of Fame.[198] When the University chose six semi-finalist candidates, all of whom were white, Jackson was not included.[199]

In the suit, Jackson argued that the requirement of collegiate coaching experience had a discriminatory effect on African Americans and thus, constituted disparate impact discrimination.[200] Ad-

189. 487 U.S. 977, 989-92 (1988) (holding disparate impact can be applied to subjective practices). This was a significant ruling 'because otherwise employers could avoid application of the theory by simply replacing objective employment practice with subjective decision-making, which could be tainted just as, much by subconscious stereotypes and prejudices.' Louis, *supra* note 10, at 189-90 (quoting GEORGE RUTHERGLEN, EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE 79 (2001)).

190. *See* Louis, *supra* note 10, at 190 (explaining potential disparate impact claim for subjective practices).

191. For a further discussion of diversification of coaching, see *infra* notes 307-35 and accompanying text.

192. 228 F. Supp. 2d 156 (D. Conn. 2002).

193. *See id.* at 158-59 (detailing plaintiff's allegations).

194. *Id.* (noting New Haven's specified criteria).

195. *Id.* (listing more of New Haven's required criteria).

196. *See id.* at 157 (describing New Haven's search process).

197. *See id.* at 157-58 (summarizing Jackson's experience and qualifications).

198. *Id.* at 158 (providing Jackson's background and qualifications).

199. *See id.* (summarizing narrowing of pool of candidates).

200. *See id.* at 158-59 (outlining summary judgment standard).

ditionally, as part of his disparate treatment claim, Jackson asserted that the University intentionally discriminated against him because of his race.[201] The district court, however, granted the University's motion for summary judgment on the disparate treatment claim because Jackson failed to meet two of the four elements of the prima facie case in *McDonnell Douglass*.[202] The court found Jackson unqualified for the position and gave the University broad deference in establishing qualifications for its employees.[203] Furthermore, the court held that the plaintiff must show that hiring criteria were established in bad faith for them to be found unreasonable.[204]

The district court ruled in favor of the University on the disparate impact claim as well.[205] The court found Jackson's statistical evidence unpersuasive.[206] It pointed to Jackson's "exceedingly

201. *See id.* (providing basis for Jackson's disparate treatment and impact claims).

202. *See id.* at 162 (finding court could not equate minor league experience with collegiate coaching).

203. *See id.* at 161 (explaining why Jackson did not meet prima facie showing).

204. *See id.* (stating that there was no evidence of disparate treatment).

> [T]he district court gave deference to three cases: *Thornley v. Penton Publishing*, 104 F.3d 26 (2d Cir. 1997); *Schaffner v. Glencoe Park District*, 256 F.3d 616 (7th Cir. 2001); and *Howley v. Town of Stratford*, 217 F.3d 141 (2d Cir. 2000).
>
> In *Thornley*, the Second Circuit defined the term "qualified" as "the criteria the employer has specified for the position. Absent a showing by the plaintiff that the employer's demands were made in bad faith . . . an employer . . . is not compelled to submit the reasonableness of its employment criteria to the assessment of either judge or jury." The *Schaffner* court determined that "[w]hat the qualifications for a position are, even if those qualifications change, is a business decision, one courts should not interfere with. We do not tell employers what the requirements for a job must be." Finally, in *Howley*, the Second Circuit determined that a city was "entitled to set its own criteria" for the position of assistant chief, in that it deemed four years of line-officer experience necessary, which the applicant-plaintiff did not possess.

Maravent and Tario, *supra* note 33, at 48 (discussing precedent cited by *Jackson* court).

205. *See Jackson,* 228 F. Supp. 2d at 163-64 (explaining shifting burden analysis under disparate impact).

206. *See id.* (finding Jackson's disparate impact claim failed). Jackson primarily referenced many of the same statistics that would be included in a likely Division I FBS Title VII action, including the lack of diversity amount college football coaches across all NCAA divisions and that the University of New Haven applicant pool demonstrate a causal link between the prior experience requirement and its impact on African Americans. *See* Nichols, *supra* note 6, at 24 (indicating possible need to focus on employer's practices). Gordon mentions that a few high school coaches filed Title VII claims but most of them lost on summary judgment. *See* Gordon, *supra* note 18, at 8-9 (examining frequency of summary judgment against coaches). These cases are: *Hardman v. Board of Education of the Dollarway, Arkansas School District* , 714 F.2d 823 (8th Cir. 1983); *Lujan v. Franklin County Board of Education* , 766 F.2d 917 (6th Cir. 1985); *Harris v. Birmingham Board of Education* , 712 F.2d 1377 (11th Cir. 1983); *Autry v. Nassau County School Board* , 2006 WL 1232812 (M.D. Fla. 2006); *Wilkerson v. Columbus Separate School District* , 985 F.2d 815 (5th Cir. 1993); *Riley v. Birmingham Board of Education*, 154 F. App'x 114 (11th Cir.

small sample" size as the reason that a causal connection could not be established between the University's hiring practice and discriminatory effect.[207]

F. The Perfect Plaintiff

The *Jackson* case demonstrates the difficulty of winning a Title VII suit without the right plaintiff.[208] Part of Jackson's problem was that the court did not consider him qualified for the position, which meant he could not establish a prima facie case under *McDonnell Douglas*.[209] An ideal plaintiff would have head coaching experience at the collegiate or professional level.[210] Prior experience in head coaching would demonstrate that he was at least minimally qualified at another institution and would allow his success at that school to be assessed to prove that he was qualified for the position at the defendant school.[211]

2005). *See* Gordon, *supra* note 18, at 8-9 n.38. (providing examples of failed Title VII claims).

207. *See Jackson*, 228 F. Supp. 2d at 164 (criticizing Jackson's statistical findings).

> If it is assumed that the number of applications for the New Haven position was roughly the same as the ordinary head college football position at a comparable university, the court appears to fault Jackson for bringing a Title VII action related to a position for which statistical information is ordinarily "exceedingly small." A built-in bias for employers of a small number of employees – for whom the statistical sample is likely to always be undersized – cannot be what the Griggs court had in mind when holding that a statistical analysis can be an important component of a disparate impact case.

Nichols, *supra* note 6, at 24-25 (evaluating *Jackson* Court's analysis).

208. *See* Maravent and Tario, *supra* note 33, at 48 (discussing potential Title VII suit). This section examines the ideal plaintiff in respect to discriminatory hiring, however, a plaintiff may also bring a claim based on discriminatory pay. *See* Louis, *supra* note 10, at 181-83 (providing evidence that black college football coaches are compensated at significantly lower level than white coaches along with being paid less than NCAA average). The remedial statute for discriminatory pay is the Equal Pay Act. 29 U.S.C. § 206(d). Louis explains that the average salary for a Division I-A head football coach in 2006 was $950,000.00. *See* Louis, *supra* note 10, at 181 (citing Jodi Upton & Steve Wieberg, *Contracts for College Coaches Cover More than Salaries*, USA TODAY, Nov. 17, 2006, http://www.usatoday.com/sports/college/football/2006-11-16-coaches-salaries-cover_x.htm). The average salary of a black head football coach in Division I-A was $833,754.40 in 2006. *See id.* at 182. That is a difference of $116,245.60. *See id.*

209. For a further discussion of the *McDonnell Douglas* case, see *supra* notes 202-205 and accompanying text.

210. *See* Nichols, *supra* note 6, at 26 (explaining requisite need for qualifications to meet burden); Louis, *supra* note 10, at 186 (assessing advantages of plaintiff with head coaching experience).

211. *See* Nichols, *supra* note 6, at 26 (emphasizing that past experience would provide coaching candidate with valuable statistical evidence); Louis, *supra* note 10, at 186 (discussing fact that prior head coaching experience indicates certain

The willingness of potential plaintiffs to legal action also complicates advocates' intentions of effecting change through the courts.[212] Lapchick contends all that is needed to be successful is the "right case . . . backed by a discriminated coach willing to take a stand."[213] Lapchik and Duru, however, recognize that finding a willing plaintiff is difficult because a coach by bringing a lawsuit risks losing his coaching career.[214] Commentators believe that a coach who pursues legal action against a college or university will be ostracized.[215] Consequently, the position of coaches who might consider bringing Title VII claims is akin to that of whistleblowers.[216] Additionally, the problem of finding a potential plaintiff is further compounded by the fact that most coaches likely are unaware of Title VII's provision outlawing employer retaliation for reporting discrimination.[217]

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level of qualification). Measurements of success might include team record, as well as recruiting data. *See id.* (noting which data might be helpful).

212. *See* Maravent, *supra* note 33, at 48 (reflecting upon complications of bringing lawsuit).

213. American Council on Education, *supra* note 78 (reporting Lapchick's comments from congressional hearing). In discussing the possibility of legal action, Robert Clegg, president and general counsel of the Center for Equal Opportunity said:

> What you would have to do is pick out a particular college and say, all right . . . they've never hired an African American as a head coach. There've been plenty of African American individuals who have applied, and their qualifications are better than (those of) the people who were actually hired.

Ford, *supra* note 6, at 91 (citing Steve Wieberg, *Black Coaches Association will Use Title VII as tool in Encouraging Diversity in NCAA*, USA TODAY, Sept. 5, 2007, *available at* http://www.usatoday.com/sports/college/football/2006-09-05-title7ncaa_x. htm).

214. *See* Maravent & Tario, *supra* note 33, at 48 (noting potential effect on coach's career); *see also* Louis, *supra* note 10, at 186-87 (discussing feared "stigma" associated with bringing suit for discrimination); Walker, *supra* note 2, at 261-63 (detailing what happened to Curt Flood after he brought suit against MLB).

215. *See* Maravent & Tario, *supra* note 33, at 48 ('A coach could, as a result of such an action, be black-balled in coaching circles, a la Curt Flood, which hurt his coaching opportunities.') (citing Telephone Interview with Temple University Beasley School of Law Professor Jeremi Duru (Mar. 20, 2007)); Nichols, *supra* note 6, at 26; Louis, *supra* note 10, at 186 (noting that coach will want to avoid being labeled 'The Coach Who Sued Because He Was Not Hired'); Gordon, *supra* 18, at 8 (explaining that filing claim is risky for coach).

216. *See generally* Marci Alboher Nusbaum, *Personal Business; Blowing the Whistle: Not for the Fainthearted*, N.Y. TIMES, Feb. 10, 2002, *available at* http://www. nytimes.com/2002/02/10/business/personal-business-blowing-the-whistle-not-for-the-fainthearted.html (explaining that hero treatment given to Enron whistleblower Sherron Watkins is far from ordinary).

217. *See* 42 U.S.C. § 2000e-3(a) (2000). The anti-retaliation provision provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because her has opposed any practice made an unlawful employment

Jackson brought his claim before the movement to diversify coaching was well organized in college football or the NFL.[218] Now, the BCA has partnered with Spector Gadon & Rosen, a Philadelphia-based law firm, to create an employment rights hotline for coaches who believe to be victims of discrimination.[219] Hopefully, with the resources and support that the BCA offers potential plaintiff coaches, one will soon come forward, willing to take a stand.[220]

G. The Coin Flip: The Potential for a Reverse Discrimination Claim

1. *Reverse Discriminations Against Private Universities*

Title VII protections are not just limited to minorities; whites may bring claims as well.[221] Therefore, a program that the NCAA or one of its member institutions implements to promote the hiring of minority head coaches might backfire and subject the NCAA or

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> practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Id.

218. *See* Jackson v. University of New Haven, 228 F. Supp. 2d 156 (D. Conn. 2002) (noting disposition of case occurred in October 2002, just before Cochran and Mehri handed their report to NFL).

219. BCA Member Employment Rights Hotline, http://bcasports.cstv.com/genrel/ 122208aag.html (last visited Oct. 31, 2009). On its website, the BCA explains:

> It has been well publicized lately that minority coaches and other minority athletic program employees are consistently faced with difficult legal issues relating to all aspects of their employment, including discriminatory failures to hire and promote, equal job assignment and compensation, and contract problems. In response to these important employment issues and as an important membership benefit, the BCA has established the BCA MEMBER EMPLOYMENT RIGHTS HOTLINE to permit our members to call a nationwide, toll-free telephone number and confidentially discuss their individual employment concerns with a qualified sports/employment attorney at no initial cost to the member.

Id.

220. *See id.* (announcing BCA's willingness to assist potential plaintiff pro bono).

221. *See* Collins, *supra* note 2, at 890 (citing *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295-96 (1976)) (explaining history of reverse discrimination suits). Shropshire explains that reverse discrimination claims stem from the competing tensions in Title VII. *See* Shropshire, *supra* note 2, at 464 (discussing how any affirmative action can create potential for reverse discrimination claims). Affirmative action plans that require race to be taken into account on their face seem to be violations of the law. *See id.* at 463-64 (assessing legality of affirmative action plans). Many of these programs, however, are meant to reduce the effects of past discrimination and thus the consideration of race is "benign and legal." *Id.* at 464.

institutions to liability for reverse discrimination.[222] Moreover, if colleges and universities comply with the guidelines set forth by the Division IA Athletic Directors' Association, a white coach may sue for injury suffered pursuant to those guidelines.[223] Some commentators, however, believe that the Rooney Rule will be found valid under a reverse discrimination claim.[224]

In a reverse discrimination claim, the threshold issue will be: whether the Robinson Rule amounts to affirmative action.[225] Proponents of the rule deny that it is affirmative action, probably because they are afraid it will then be subject to judicial examination for reverse discrimination.[226] Brian Collins believes, however, that

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222. *See* Nichols, *supra* note 6, at 17 (exploring potential for liability in case of reverse discrimination); Cummings, *supra* note 3, at 37 (discussing possibility of reverse discrimination suit).

223. For a further discussion of NCAA coaching guidelines, see *supra* notes 97-106 and accompanying text.

224. *See* Collins, *supra* note 2, at 872 (describing Rooney Rule as "legally viable"); Cummings, *supra* note 3, at 37 (asserting that reverse discrimination suit will likely fail).

225. *See* Collins, *supra* note 2, at 888 (analyzing reverse discrimination suit in context of NFL's Rooney Rule). The Robinson Rule at this point would be voluntary affirmative action. *See id.* Affirmative action, however, can be voluntarily implemented by employers or can be a response to legal action. *See* Shropshire, *supra* note 2, at 460 (reviewing affirmative action generally in Corporate America). A claim challenging an affirmative action plan would be for systemic disparate treatment, but white plaintiffs may also bring individual disparate treatment claims, as well as disparate impact claims. *See id.*

226. *See* Collins, *supra* note 2, at 888 (explaining that proponents also avoid calling rule affirmative action because of reaction it evokes in majority). Cyrus Mehri said: "I don't view the [Rooney] rule as affirmative action because it focuses on process, best practices, fair competition, leveling the playing field, and letting the best rise to the top, [not quotas]." Maravent, *supra* note 33, at 263 (quoting Telephone Interview with Cyrus Mehri, Partner at Mehri & Skalet, PLLC (Nov. 18, 2005)). Moreover, John Wooten of the Fritz Pollard Alliance said:

> [I]t was never intended to be affirmative action. Pure affirmative action is firm timetables and quotas, but that is not the way to go because it is not effective. The inclusive process is the right way to thread the needle. Corporations are requiring a diversity slate. [We are] not trying to get quotas based on player ratios in the NFL. All we are saying is that we believe in the interview process—just let them (minority candidates) in the door to show their skills in an open process and they will have a great chance to get a [head coaching] job.

Id. (citing Telephone Interview with John Wooten, Chairman of the Fritz Pollard Alliance (Nov. 17, 2005)). Finally, Dr. Lapchick said: "It is pretty close but [the Rooney rule] is limited in its application. But it is for a purpose, although that purpose is to bring in the best person for the job. This is not results oriented, it is for one position only, and it is not across the board." *Id.* (citing Telephone Interview with Dr. Richard Lapchick, Dir. of the Inst. For Diversity & Ethics in Sport at the Univ. of Cent. Fla. (Dec. 17, 2005)).

the rule is "undoubtedly" affirmative action because it is "a diversity initiative aimed at correcting racial disparities."[227]

In *United Steelworkers v. Weber*, the Supreme Court developed the test for the validity of affirmative action programs.[228] In *Weber*, the Court held that "Title VII cannot be interpreted as an absolute prohibition against 'all private, voluntary, race-conscious affirmative action plans.'"[229] The Court declined to 'define . . . the line of demarcation between permissible and impermissible affirmative ac-

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227. Collins, *supra* note 2, at 888 (considering what type of affirmative action it might be). Madden asserts that the rule is structured how affirmative action was originally conceived, before quotas and timelines. *See* Madden Interview, *supra* note 72 (discussing whether Rooney Rule can be considered affirmative action). Shropshire notes,

> [A]t least four types of affirmative action are recognized: the concerted effort to recruit member of the underrepresented group; the utilization of programs such as diversity and sensitivity training; the modification of employment practices which tend to underutilize underrepresented individuals; and . . . the preferential hiring and promotion of members of underrepresented groups.

Shropshire, *supra* note 2, at 464-65. Maravent defines affirmative action as 'a business or governmental agency . . . giv[ing] special rights of hiring or advancement to ethnic minorities to make up for past discrimination against that minority.' Maravent, *supra* note 33, at 262 (citing BLACK'S LAW DICTIONARY 64 (8th ed. 2004)). Maravent argues that "[t]he Rooney Rule can be classified as affirmative action because its purpose is to afford minorities a greater opportunity in being awarded head coaching positions." *Id.* "[T]he rule is an example of a business (the NFL) giving special rights (mandating one minority interview per team with a coaching vacancy) to ethnic minorities (as the interviews arguably do) to correct past discrimination (the alleged lack of minority hires in the NFL's head coaching ranks)." *Id.* at 262-63 (matching rule's provisions to definition of affirmative action). Collins argues that the Rooney Rule has characteristics of both hard and soft affirmative action. *See* Collins, *supra* note 2, at 889 ("'[S]oft' affirmative action programs encompass outreach attempts like minority recruitment and counseling, 'hard' affirmative action programs usually include explicit preferences or quotas that reserve a specific number of openings exclusively for members of the preferred group."). The Rooney Rule is hard affirmative action because it forces NFL teams to "reserve" one interview during each search for a minority. *Id.* (expressing reasons for rule being "hard"). It is soft affirmative action because it includes minority recruitment efforts. *See id.* (detailing basis for Rooney Rule being considered "soft" affirmative action).

228. *See* Collins, *supra* note 2, at 890-91 (describing reverse discrimination law as judicially created). *Weber* involved a challenge to an affirmative action plan that reserved fifty percent of openings in a training program for blacks. *See id.* at 891 (summarizing facts of Weber case). The plan was to remain in effect until the representation of black workers in the plant was equal to that in the local labor force. *See id.* . Weber was rejected from the program in favor of black employees that had less seniority. *See id.* (expressing reasoning behind bringing suit). He sued and prevailed in the lower courts. *See id.*

229. *See id.* (quoting United Steelworkers v. Weber, 443 U.S. 193, 208 (1979)). The Court reasoned that Title VII must be read in light of its legislative history and historical context. *See id.* (citing United Steelworkers v. Weber, 443 U.S. 193, 200-02 (1979)).

tion plans,' but it did provide a test for evaluating their validity.[230] The *Weber* test includes three factors: (1) the plan must seek to correct a manifest imbalance in the employer's workforce by opening employment opportunities to minorities in areas traditionally closed to them; (2) the plan must not "unnecessarily trammel the interests of white employees"; and (3) the plan must be a temporary measure, designed to obtain, rather than maintain, a racial balance.[231]

In *Johnson v. Transportation Agency,* the Court expanded upon the "manifest imbalance" prong of the *Weber* test.[232] To find a manifest imbalance, a court must first evaluate whether the position at issue is unskilled or skilled.[233] If the affirmative action plan applies to unskilled jobs, the court must compare minority representation in the employer's workplace to minority representation in the area labor market or general population.[234] If the affirmative action program applies to skilled positions, the court must compare the percentage of minorities in the employer's workforce to the number of qualified persons in the area labor market.[235]

If a white coach brings a reverse discrimination claim against a school that followed the Robinson Rule, he first must establish his prima facie case under *McDonnell Douglass.*[236] The employer will then posit that it instituted a voluntary affirmative action policy – a form of justifiable discrimination.[237] Next, the white coach must demonstrate one of the following: (1) that the Robinson Rule is not designed to eliminate a manifest racial imbalance, (2) that it unnec-

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230. *Id.* (quoting United Steelworkers v. Weber, 443 U.S. 193, 208 (1979)).

231. *Weber*, 443 U.S. at 208-09 (outlining test).

232. *See* Collins, *supra* note 2, at 892 (explaining Court's establishment of current reverse discrimination standard). In *Johnson*, the Court upheld a voluntary affirmative action plan implemented by a country government. *See id.* "According to the Court, the Agency's plan correctly calculated imbalances and directed hiring to be governed solely by those figures, did not displace current Caucasian employees or establish a bar to their advancement, and was sufficiently temporary in its efforts to attain a balanced workforce (rather than maintain one)."

Id. (citing Johnson v. Transp. Agency, Santa Clara County, Cal., 480 U.S. 616, at 631, 634-35, 637-40 (1987)).

233. *See id.* (stressing need to determine appropriate comparison group).

234. *See id.* (quoting *Johnson*, 480 U.S. 631-32).

235. *See id.* at 892-93 (citing *Johnson*, 480 U.S. at 632) (describing reliance on *Hazelwood Sch. Dist. v. United States*).

236. *See supra* notes 131-133 and accompanying text.

237. *See* Collins, *supra* note 2, at 894 (citing *Johnson*, 480 U.S. at 626 (1987)) (explaining process whereby employer rebuts coach's claim using the rationale of affirmative action).

essarily trammels the interests of white candidates, or (3) that it is not a temporary measure.[238]

Under the manifest imbalance prong, Collins believes a court will consider head coaching to be a traditionally segregated job category.[239] As stated previously, however, the parties would dispute what constitutes an appropriate comparison group in the labor market.[240] Collins believes that head coaching will definitely be considered a skilled position; consequently, the parties would fight over how many coaches to consider qualified, and thus, whether the resulting labor market disparity rises to a level considered to be a manifest imbalance.[241]

Regarding the unnecessarily trammel prong, Collins thinks that a court will find that the Robinson Rule or the Athletic Directors' Association guidelines do not unnecessarily trammel the interests of whites because they are not an absolute bar to the advancement of white coaches.[242] Because the rule and guidelines only mandate or request interviewing and consideration, and not hiring, they do not include quotas and, instead, ensure that whoever is hired is qualified.[243] Therefore, although reserving an inter-

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238. *See id.* (citing *Johnson*, 480 U.S. at 631-32).

239. *See id.* (tracing historical segregation of NFL coaching).

240. *See id.* at 895-97 (identifying who to include in relevant labor market).

241. *See id.* at 895 (predicting that struggle will ensue over relevant comparison in reverse discrimination claim as well). Collins contends that an employer would argue that not all coaches are qualified to be head coaches and would most likely contend that the labor market be limited to offensive and defensive coordinators and not include assistant coaches. *See id.* at 896-97 (speculating that this would result in smaller minority representation in comparative labor market). Collins further posits that the parties would dispute what constituted manifest imbalance. *See id.* at 895-96 (citing *Johnson*, 480 U.S. at 632). In *Johnson*, the Court held that the disparity need not rise to the level needed to establish a prima facie case under Title VII – two or three standard deviations. *See id.* at 895-96 (citing *Johnson*, 480 U.S. at 632).

242. *See id.* at 899 (noting that rule does not mandate replacement of white coaches).

243. *See id.* at 898 ("Since he gains no entitlement to the head coaching position, a [Robinson] Rule beneficiary must still compete with all other qualified applicants, none of who are automatically excluded from consideration."); *see also* Cummings, *supra* note 3, at 37 (distinguishing between what Rooney Rule does and does not require); Maravent, *supra* note 33, at 264 (stating that rule only adds candidate to pool and does not require that minority be hired). Moreover, Collins explains that quotas "are not per se illegal." Collins, *supra* note 2, at 898. Rather, a quota will only be found invalid if there is not a legitimate basis for the figure set by the policy, like when it is based on "speculative or amorphous data [and] is arbitrarily fixed." *Id.*

view for a minority may be considered a significant advantage, it does not unnecessarily trammel the rights of white candidates.[244]

Finally, Collins proposes that the temporary measure prong is the factor that comes closest to rendering the Robinson Rule or Athletic Directors' Association guidelines invalid.[245] If the Robinson Rule, when adopted, is identical to the Rooney Rule, it would contain no time limitation.[246] In *Johnson*, the Court upheld a plan with no end date, and found that an end date is only necessary when there are explicit quotas and that the plan at issue sought to attain, and not maintain, balanced representation,.[247] Therefore, Collins contends that the Robinson Rule and guidelines, which do not include quotas or timetables, are still temporary because of the "moderate, gradual approach [they take] to eliminating the racial imbalance."[248]

2. *Reverse Discrimination Against Public Universities*

Public entities are subject to liability under Title VII and in *Johnson*, the plaintiff sued such an entity.[249] Public entities' affirmative action programs, however, are also subject to constitutional review under the Equal Protection Clause.[250] Therefore, public universities who employ the Robinson Rule or Athletic Directors' Association guidelines may be sued for violating a white coach's equal protection rights.[251]

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244. *See* Collins, *supra* note 2, at 897-99 (explaining it is significant because team cannot interview unlimited number of candidates). Maravent explains that "[a]s long as the interview process remains fundamentally fair to all candidates, minority and majority, there is no trammeling of interests." Maravent, *supra* note 33, at 264.

245. *See* Collins, *supra* note 2, at 899 (classifying rule as "flirt[ing] with impermissibility"); *see also* Maravent, *supra* note 33, at 264 (describing factor as rule's "weakest").

246. *See* Collins, *supra* note 2, at 899 (noting that rule has no end date); Maravent, *supra* note 33, at 264 (mentioning that rule does not specify how long it should be enforced).

247. *See* Collins, *supra* note 2, at 899 (citing *Johnson*, 480 U.S. at 639-40) (referencing holding of Johnson whereby lack of termination date does not render Rule void).

248. *Id.* at 899-900 (contending that Rooney Rule will be found valid under Title VII reverse discrimination analysis).

249. *See* Nichols, *supra* note 6, at 18 (noting that schools are also subject to liability as federally assisted programs).

250. *See* Maravent, *supra* note 33, at 252 (describing tests for public and private employers).

251. *See* Nichols, *supra* note 6, at 18 (relying upon Fourteenth Amendment Right of Equal Protection). A plaintiff may argue that a private university is violating Title VI, but that is outside the scope of this article. *See id.*

The Supreme Court held, in *National Collegiate Athletic Association v. Tarkanian*, that the NCAA was not a state actor.[252] Public universities, however, the Court determined were state actors.[253] As a result, in *Tarkanian*, the University of Nevada Las Vegas was found liable for depriving its basketball coach of procedural and substantive due process rights.[254] Consequently, when public universities implement NCAA regulations, they must still comply with constitutional requirements.[255] A public university would have to defend a challenge to the Robinson Rule or the Athletic Directors' Association guidelines under Equal Protection analysis, despite the fact that the NCAA would monitor, or the Athletic Directors' Association does monitor compliance.[256]

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252. 488 U.S. 179, 197-98 (1988). The Court described the NCAA as "an unincorporated association of approximately 960 members, including virtually all public and private universities and 4-year colleges conducting major athletic programs in the United States. Basic policies of the NCAA are determined by the members at annual conventions." *Id.* at 183 (characterizing defendant as private entity). Moreover, the NCAA,

> Has . . . adopted rules, which it calls "legislation," . . . governing the conduct of the intercollegiate athletic programs of its members. This NCAA legislation applies to a variety of issues, such as academic standards for eligibility, admissions, financial aid, and the recruiting of student athletes. By joining the NCAA, each member agrees to abide by and to enforce such rules.

Id. (explaining that there was not sufficient nexus between NCAA and UNLV). *Tarkanian*, was a 5-4 decision, and Justices White, Brennan, Marshall and O'Connor dissented. *See id.* at 199 (White, B., dissenting). The dissent wrote that the Court had previously held that private parties could be state actors in situations where the final act was conducted by a state official, as long as the private party and state actor where jointly engaged. *See id.* at 200 (citing Dennis v. Sparks, 449 U.S. 24, 27-28 (1980)). Moreover, in *Cohane v. National Collegiate Athletic Ass'n*, the Second Circuit held that *Tarkanian* cannot be interpreted to categorically stand for the proposition that the NCAA can never be found to be a state actor. *See* Cohane v. Nat'l Collegiate Athletic Ass'n, 215 Fed. Appx. 13, 16 (2d Cir. 2007) ("[I]t was error for the District Court to interpret *Tarkanian* as holding categorically that the NCAA can never be a state actor when it conducts an investigation of a state school.").

253. *See Tarkanian*, 488 U.S. at 192 (stating that UNLV is undoubtedly state actor). In describing UNLV's role, the Court said: "UNLV is a branch of the University of Nevada, a state-funded institution. The university is organized and operated pursuant to provisions of Nevada's State Constitution, statutes, and regulations. In performing their official functions, the executives of UNLV unquestionably act under color of state law." *Id.* at 183.

254. *See id.* at 187-88, 192-93 ("When [UNLV] decides to impose a serious disciplinary sanction upon one of its tenured employees, it must comply with the terms of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.").

255. *See id.* at 192-93 (finding UNLV is still subject to Section 1983 liability).

256. *See* Maravent, *supra* note 33, at 252 (describing how public actors are held to Equal Protection Clause when implementing affirmative action policies).

The Fourteenth Amendment's Equal Protection Clause prohibits states from denying to any person equal protection of the law.[257] According to the Supreme Court, race-based classifications are suspect and, therefore, subject to strict scrutiny under equal protection analysis.[258] Under a strict scrutiny standard, the government must demonstrate that the racial classification was necessary to achieve a compelling state interest.[259] The government must also demonstrate that the means chosen were narrowly tailored.[260]

The Robinson Rule and the Athletic Directors' Association guidelines include race-based classifications.[261] Consequently, a court would apply strict scrutiny to determine whether the school violated the white coach's right to equal protection.[262] The public university might posit two compelling interests: (1) that the university has an interest in ending discrimination in public employment; and (2) that the university has an interest in creating a more constructive educational atmosphere for its students by providing them with positive role-models.[263] A court, however, may not accept

257. *See* U.S. CONST. amend. XIV, § 1 ("[N]or deny to any person within its jurisdiction the equal protection of the laws.").

258. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 216 (1995) (holding that race-based classifications are subject to strict scrutiny).

259. *See id.* at 202 (clarifying that strict scrutiny requires government to demonstrate compelling interest); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 300 (1978) (requiring government to show compelling state interest).

260. *See Adarand*, 515 U.S. at 227 ("[S]uch [racially based] classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.").

261. For a further discussion about the Robinson Rule, see *supra* notes 59-70 and accompanying text. For a further discussion about the Athletic Directors' Association guidelines, see *supra* notes 96-105 and accompanying text.

262. *See Adarand*, 515 U.S. at 216 (holding that race-based classifications are subject to strict scrutiny); Grutter v. Bollinger, 539 U.S. 306, 331 (2003) ("[The Court has] held that all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.' This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.").

263. *See Grutter*, 539 U.S. at 352 (Thomas, C., dissenting) (citing Wygant v. Jackson Bd. of Ed., 476 U.S. 267 315 (1986) ("The school board defended [collective bargaining agreement that favors minorities] on the grounds that minority teachers provided "role models" for minority students and that a racially "diverse" faculty would improve the education of all students.); *Id.* at 367 ("The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting" (quoting Cal. Const., Art. 1, § 31(a)); *see also* Gratz ,v. Bollinger, 539 U.S. 244, 257 (2003) ("Respondents contended that the LSA has [a compelling government interest] in the educational benefits that result from having a racially and ethnically diverse student body and that its program is narrowly tailored to serve that interest."). do not italicize case (Grutter) R1.2; correction of case citation

these rationales.[264] If the court finds that the state does not have a history of discriminating against minority coaches, it may reject the first interest asserted by the state.[265] Moreover, if the court finds that the Robinson Rule or the Athletic Directors' Association guidelines are over-inclusive and are not specifically directed at a group that the state has historically discriminated against in coaching, then it may also dismiss the first compelling interest.[266]

The court may also reject the second compelling interest. It was specifically rejected by the plurality in *Wygant v. Jackson Board of Education*.[267] There, the plurality found that the school board's interest in "providing minority role models for its minority students, as an attempt to alleviate the effects of societal discrimination" was not a compelling interest and did not justify the race-based classification.[268]

Even if the court accepts the public university's compelling interest rationales, the university must still show that the Robinson Rule or the Athletic Directors' Association guidelines are narrowly tailored.[269] Here, the university would argue that the Rule ensures that minorities are hired in positions from which they were histori-

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264. *See Gratz*, 539 U.S. at 271 (holding University of Michigan's policy that automatically grants "underrepresented minority" candidates one-fifth of points needed to guarantee admission solely because of race to not be "narrowly tailored" to advance an interest in educational diversity). See R1.2

265. *See Adarand*, 515 U.S. at 221 (rejecting state interest in ending public employment discrimination and ruling state interest not compelling if no historical evidence of discrimination exists).

266. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) ("The gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation." (citing Wygant v. Jackson Bd. of Edu., 476 U.S. 267, 284, n.13 (1986))).

267. *Wygant*, 476 U.S. 267 (1986) (insinuating "role model" theory would allow Boards to engage in discriminatory hiring and layoff practices far beyond what is required by any legitimate remedial purpose).

268. *Id.* at 274. Justice White, concurring in judgment, agreed that the school board's interest did not justify the racially discriminatory policy. *See id.* at 295 ("None of the interests asserted by the Board, singly or together, justify this racially discriminatory layoff policy and save it from the strictures of the Equal Protection Clause.").

269. *See J.A. Croson Co.*, 488 U.S. at 506 ("The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination."); Grutter, v. Bollinger, 539 U.S. 306, 333 (2003) (quoting Shaw v. Hunt, 517 U.S. 899, 908 (1996) ("Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still "constrained in how it may pursue that end: [T]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose.").

cally excluded.[270] They would argue that the rule is not restrictive and that it simply calls for the addition of a minority to the list of candidates interviewed.[271] The white coach, however, would argue that the minority was not added to the list of those interviewed, but rather replaced the white coach on the list of candidates to be interviewed.[272] The white coach would also assert that there are other types of affirmative action programs to ensure that minority candidates are hired, such as training programs for minority coaches and diversity training for those hiring.[273] The university would respond that those programs are not effective in remedying the problem immediately and that their effect will only occur in the long-term.[274] Finally, the university may demonstrate the effectiveness of the Robinson Rule by using evidence from the NFL's experience with the Rooney Rule.[275]

It is unclear how a court might rule on an equal protection claim questioning the validity of the Robinson Rule or Athletic Directors' Association guidelines. Nevertheless, there is a plethora of case law where plaintiffs alleged that public universities who complied with NCAA regulations were violating the plaintiffs' constitutional rights.[276] Therefore, any adoption of the Robinson Rule must be carefully crafted to comply with the constitutional requirements of public universities.

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270. *See* Collins, *supra* note 2, at 894 (proposing that employers need only to articulate some nondiscriminatory rationale for its decision, with affirmative action rationale sufficing).

271. *See* Cummings, *supra* note 3, at 131 ("[T]he Rooney Rule does not mandate any hiring action on the part of the owners of the privately owned NFL clubs. The Rooney Rule does not even assign a "plus factor" to the minority candidates that are interviewed by the NFL clubs."); Maravent, *supra* note 33, at 264 (revealing effect on white coaches).

272. *See* Maravent, *supra* note 33, at 264 (indicating opposite that white candidates are not barred from receiving opportunity to interview).

273. *See* Shropshire, *supra* note 2, at 464-65 (suggesting alternative types of affirmative action).

274. *See* Nichols, *supra* note 6, at 161.

275. *See* Collins, *supra* note 2, at 121; Nichols, *supra* note 6, at 157 ("The Rooney Rule is widely credited as being the catalyst for the rapid increase in minority head coaches [in the NFL].").

276. *See generally* Maloney v. Nat'l Collegiate Athletic Ass'n, *897 N.E.2d 253* (Ill. 2008); Cohane v. Nat'l Collegiate Athletic Ass'n, 2008 WL 3286396 (W.D.N.Y. 2008); Bowers v. Nat'l Collegiate Athletic Ass'n, 563 F. Supp. 2d 508 (D.N.J. 2008); Bassett v. Nat'l Collegiate Athletic Ass'n, 528 F.3d 426 (6th Cir. 2008); Cottrell v. Nat'l Collegiate Athletic Ass'n, 128 S. Ct. 1334 (2008); Harrick v. Nat'l Collegiate Athletic Ass'n, 454 F. Supp. 2d 1255 (N.D. Ga. 2006).

H. Whether the NCAA Can Be Held Responsible

Although the NCAA is partly responsible for the diversity problem in college football coaching, it is unlikely that a plaintiff will name the NCAA in a Title VII discrimination lawsuit.[277] Some believe that the NCAA, in its role as regulator of college athletics, can be sued for fostering a system where its member institutions' hiring practices have a disparate impact on blacks.[278] But the NCAA is not actually an employer and is not involved in the colleges' and universities' actual hiring decisions.[279] Moreover, the NCAA will not be found liable in a case involving a constitutional issue, be it an equal protection claim or a § 1983 action, because it is not a state actor.[280] Therefore, the NCAA most likely will not be found liable for a problem it is responsible for perpetuating which may be why its response to threats of legal action, thus far, have been limited.[281]

V. THE NCAA'S EVASIVE RESPONSE

A. The NCAA's Diversity Initiatives

After the lack of diversity in head coaching positions received increased attention, the NCAA implemented new initiatives to increase the number of minority coaches.[282] In 2005, the NCAA created the Office of Diversity and Inclusion (the ODI).[283] Brand hired Charlotte Westerhaus to be Vice President of the office and gave her the responsibility of helping schools and the NCAA diversify their workforces.[284] As a result, the number of blacks employed

277. *See* Gordon, *supra* note 18, at 9 (describing NCAA's role and responsibility).

278. *See* Louis, *supra* note 10, at 189 (hoping court will find close tie between NCAA and employer so NCAA can be held responsible).

279. *See* Gordon, *supra* note 18, at 9 (observing difficulty in holding NCAA responsible for hiring decisions); Louis, *supra* note 10, at 192-96 (describing NCAA's actual role).

280. For a further discussion of the NCAA's status as a non-state actor, see *supra* notes 254-257 and accompanying text.

281. For a further discussion of the NCAA's apparent lack of concern regarding legal action, see *infra* notes 297-307 and accompanying text.

282. *See* Ford, *supra* note 6 at 109 n.174 (citing to Press Release, NCAA, NCAA Selects 12 Participants for Expert Coaching Program to be Held in Indianapolis, June 1-3 (May 21, 2004), *available at* http://www.ncaa.org/wps/ncaa?ContentID=8051); *see also* Maravent & Tario, *supra* note 33, at 48 (describing NCAA initiatives).

283. *See* Racial and Gender Report Card, *supra* note 8, at 4 (describing NCAA diversity program); Nichols, *supra* 6, at 155 (mentioning creation of office); Ford, *supra* note 6, at 110 (noting creation of office).

284. *See* Ford, *supra* note 6, at 110 (describing Westerhaus's responsibilities); Gordon, *supra* note 18, at 13 (discussing Westerhaus's hiring).

as NCAA administrators increased from forty-six to sixty-four.[285] The ODI offers to host diversity training programs at individual colleges and universities.[286] It aims to help schools understand the diversity problem and provides approaches to alleviate the problem by publishing reports such as "Best Practices: Achieving Excellence Through Diversity and Inclusion," "Best Hiring Practices," and "Race and Gender Demographics of NCAA Member Institutions' Athletics Personnel."[287] Finally, the NCAA offers scholarships, grants, and awards to promote and reward diversity.[288]

The ODI is attempting to address the pipeline problem, which it believes to be the cause of the dearth of minority head coaches.[289] Its approach is to train coaches with the expectation that they will one day be considered candidates for head coaching positions.[290] The NCAA partnered with the NFL, BCA and American Football Coaches Association to create the Coaches' Acad-

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285. *See* Diversity Hearing, *supra* note 12 (noting diversity initiatives).

286. *See* Nichols, *supra* note 6, at 155 (taking notice that training is offered at member institutions); Gordon, *supra* note 18, at 13 (establishing that training is offered at no cost).

287. Nichols, *supra* note 6, at 155 (listing reports Office of Diversity and Inclusion publishes). The NCAA, however, has not released some of these reports in recent years. *See* Lapchick, *Racial and Gender Report Card*, *supra* note 8, at 4.

288. *See* Nichols, *supra* note 6, at 155 (giving overview of NCAA scholarships to award and promote diversity); Gordon, *supra* note 18, at 13 (mentioning grants given to Division II and III schools and for coaching internships for minorities and women, as well as "Woman of the Year" awards).

289. *See* Ford, *supra* note 6, at 97 (discussing efforts to address pipeline problem); Gordon, *supra* note 18, at 13 (illustrating efforts of Office of Diversity and Inclusiveness); Nichols, *supra* note 6, at 155 (noting additional efforts made to address lack of minority coaches in college football).

290. *See* Ford, *supra* note 6, at 110 (portraying mission of Office of Diversity and Inclusion); Gordon, *supra* note 18, at 13 (discussing men's and women's academies); Nichols, *supra* note 6, at 155 (summarizing training at Coaches Academy). Actually, "Kansas State University's Ron Prince, Columbia University's Norries Wilson, and St. Peters College's Chris Taylor" are Academy graduates. *Diversity Hearing*, *supra* note 12 (reporting impact of Coaches Academy). In his State of the Association address in 2007, Brand said:

> [T]he NCAA can help prepare candidate for the search process. The NCAA conducts nineteen programs annually to provide practical and professional education and advice to candidates. These programs range from academies for relative beginners to advanced levels, and include opportunities for both men and women. Hundreds of individuals have gone through these programs during the last five years.

Brand Address, *supra* note 4 (providing framework of Coaches Academy program). The NCAA holds other training opportunities for groups that are similarly underrepresented in coaching positions, such as women. *See* Nichols, *supra* note 6, at 155 (describing training for traditionally underrepresented minorities, including women).

emy.[291] 'The Coaches Academy is an NCAA initiative created to address the critical shortage of ethnic minorities in head coaching positions in the sport of football.'[292] There are three levels to the Coaches Academy program: Expert, Advanced, and Executive.[293] Another program, the Future Coaches Academy, works to train former players who aspire to become college coaches.[294]

B. Criticism Levied Against the NCAA's Diversity Initiatives

The NCAA's diversity initiatives are criticized for not going far enough.[295] Dr. Madden concluded in her report to the NFL that the "pipeline" excuse is overstated.[296] She demonstrated that black coaches were performing at a higher level than white coaches and, thus, were being held to a higher standard.[297] If the same double

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291. *See* Ford, *supra* note 6, at 109 (describing effort to create training sessions for coaches).

292. *Id.* (explaining that academy seeks to address shortage of qualified minority candidates (quoting *NCAA Selects 12 Participants for Expert Coaching Program to be held in Indianapolis*, June 1-3 (May 21, 2004), *available at* http://www.ncaa.org/wps/ncaa?key=/ncaa/NCAA/Media+and+Events/Press+Room/News+Release+Archive/2004/Miscellaneous/NCAA+Selects+12+Participants+for+Expert+Coaching+Program+to+be+Held+in+Indianapolis,+June+1-3

293. *See id.* at 109-10 (conveying different types of training offered).

> The expert Coaching Program was created for minority football coaches with at least six years of coaching experience and has the goal of teaching and reinforcing "various aspects of securing, managing and excelling in NCAA head coaching positions at the Division I-A level; and to provide participants with an experience that emphasizes the importance of skill enhancement, networking and exposure to key stakeholders in intercollegiate athletics." The Advance Coaching Program is for football coaches with at least four years of experience, and the Executive Coaching Program is for football coaches with at least eight years of experience.

Id. (defending efforts to help coaches from all types of backgrounds and experiences).

294. *See id.* at 109 (discussing part of program that aims to recruit young former players). The objectives of the Coaches' Academy are:

> (1) [t]o increase the understanding and application of skills necessary to secure head coaching positions; (2) to increase the understanding and awareness of competencies necessary for success in head coaching at the intercollegiate level; (3) to motivate assistant coaches and coordinator to pursue careers as head coaches at the Division I-A level; (4) to introduce ethnic minority and women coaches to senior level coaches and administrators through a mentoring program; (5) to raise public awareness of the existing talent pool of ethnic minority and women coaches; and (6) to promote the coaching profession to student-athletes, graduate assistants and others[.]

Id. (listing Coaches Academy objectives). [No Star Pagination]

295. *See* Nichols, *supra* note 6, at 161 (outlining initiatives' inadequacies).

296. Madden Report, *supra* note 42, at 16-18 (debunking NFL's pipeline excuse).

297. *See id.* at 6 (introducing findings). It is unclear whether black coaches in college football are outperforming white coaches because the data has not been

standard exists in college coaching, then the NCAA's efforts are misplaced.

Michael Nichols criticizes the emphasis placed upon training minority coaches on two fronts.[298] First, Nichols says, "it seems to ignore that many minority coaches are already qualified and are merely not being given head coaching opportunities."[299] Second, Nichols explains, it relies on 'soft variants' to invoke change.[300] Soft variants are less effective and take longer to yield results, yet are used because the majority finds them less offensive.[301] Nichols concludes that "[b]y using soft variants, the NCAA can give the appearance of action."[302]

Hanna Gordon agrees that efforts such as the Office of Diversity and Inclusion are merely symbolic.[303] She discusses a theory that institutions will set up formal structures like a diversity committee in response to equal employment opportunity law but then allocate insufficient resources to these committees.[304] These

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analyzed. But it is worth mentioning that the NCAA is relying on an excuse that Madden disproved in the NFL context.

298. *See* Nichols, *supra* note 6, at 161-62 (discussing inadequacies of current minority coach training).

299. *Id.* "The concept of hard versus soft variants regards the difference in method used to achieve a result rooted in affirmative action. 'While "soft" affirmative action programs encompass outreach attempts like minority recruitment and counseling, "hard" affirmative action programs usually include explicit preferences or quotas that reserve a specific number of openings exclusively for members of the preferred group.'" *Id.* at 161 n.65 (quoting Collins, *supra* note 2, at 889). Gordon also argues that focusing on training ignores the fact that the coaches are in fact already qualified and are simply not being hired. *See* Gordon, *supra* note 18, at 13 ("First, the emphasis on preparation suggests that candidates are not already qualified and possess the "soft skills" required for interviewing."). She cites to research that studies the common perception among employers that minorities lack skills in areas such as communication, interaction and motivation. *See id.* at 13 n.59 (citing Karen Chapple & Michael B Teitz, *The Causes of inner-City poverty: Eight Hypotheses in Search of Reality*, CITYSCAPE: A J. OF POL'Y DEV. & RES., (Sept. 1998), at 33, 35).

300. *See* Nichols, *supra* note 6, at 161 (explaining differences in effectiveness of varying types of affirmative action).

301. *See id.* (describing slow nature of soft affirmative action).

302. *See id.* (affirming that NCAA is avoiding addressing problem). Gordon similarly criticizes the NCAA programs because nothing has changed; despite the coaching academes, minorities remain underrepresented in head coaching positions. *See* Gordon, *supra* note 18, at 14 (discussing hiring statistics).

303. *See* Gordon, *supra* note 18, at 14 (explaining NCAA implemented initiatives that cannot invoke change).

304. *See id.* (citing Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589 (2001)).

committees, subsequently, are simply highly visible signs of compliance designed to assuage equality advocates.[305]

VI. BETTER WAYS TO AVOID LITIGATION, BUT MORE IMPORTANTLY, DIVERSIFY COACHING

A. Attack the Hiring Process as a Whole

Dutch Baughman concedes "we must do a better job of the identification and interviewing procedure before we begin to see significant improvements in the number of head coaches."[306] In that vein, Jacquelyn Bridgeman asserts that despite the progress that has been made by laws, like Title VII, to diversify all levels of the workforce, the current law fails to address the problem in its entirety.[307] Consequently, Bridgeman argues that we should look to sports, specifically the differing selection procedures for players and coaches, for guidance on addressing the diversity problem in upper-management.[308]

When a coach chooses a player for a team, the coach may watch the player in game situations to evaluate his skill level.[309] Other times, the coach will analyze his player statistics to predict future performance.[310] Alternatively, a coach may directly asses a player's skills to ensure that he will be competitive.[311] Lastly, a

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305. *See id.* (summarizing how diversity committees redefine compliance with equal opportunity laws).

306. *See* Nichols, *supra* note 6, at 154 (quoting Interview with Dutch Baughman, Executive Director of the Division 1A Athletic Directors' Association (May 27, 2008)).

307. *See* Bridgeman, *supra* note 10, at 259-60 (accounting for inadequacies of Title VII). Bridgeman explains,

> While this progress is significant and should not be discounted, it is much less remarkable when one considers that many opportunities in high positions are still largely foreclosed to women and minorities, much like the situation in sports. For example, while the percentages of black attorneys has risen from less than 1% to approximately 3.9% of all U.S. attorneys in the last forty years, black comprise 12.9% of the population. When these facts are taken into consideration, the progress does not look as significant. Many economic sectors demonstrate similar low numbers of women and minorities in higher-level jobs. This disparity is clearly illustrated when one compares higher paying, more prestigious jobs to those that pay less and carry less prestige. For example, the data from the 2000 census reveals . . . [t]he top professions were overwhelmingly white and male.

Id. at 260-61 (exposing areas of workforce that Title VII cannot reach).

308. *See id.* at 261-62 (encouraging advocates to examine hiring processes in sports to understand other industries).

309. *See id.* at 262 (describing how players get hired or recruited).

310. *See id.* (outlining methods for proving value to coaches).

311. *See id.* (describing methods coach can evaluate player's worth).

coach may require a player to tryout for a team position, forcing competition for a spot against another player.[312]

The hiring process for coaches, however, is more subjective and is more akin to the hiring processes in other job sectors.[313] When coaches are hired, schools sometimes solicit resumes from interested candidates or compile a list of candidates "through word of mouth or upon consultation with friends or family."[314] From the pool of candidates, a school will then decide who to interview and based upon the interview, who to hire.[315] Criteria during interviewing can include subjective factors such as good recruiting ability, management expertise and public relations skills.[316] This becomes problematic because subjective hiring processes are highly susceptible to unconscious bias.[317] It is possible, however, to suppress the effects of, and sometimes completely overcome, unconscious bias.[318]

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312. *See id.* (making clear that player selection is extremely objective)

313. *See id.* at 262-63 (maintaining that hiring process for coaches is more similar to other types of jobs).

314. *Id.* at 262-63 (noting social networks' role).

315. *See id.* at 263 (commenting on narrowing selection). Bridgeman explains that a coach would never select players for a team based on whether their resume indicated they had a good background or whether they were well liked by their teammates. *See id.* Players, unlike coaches, are almost always required to demonstrate that they can perform or acquire the ability to perform, and interact well with the team. *See id.*

316. *See* Maravent and Tario, *supra* note 33, at 47 (exploring objective and subjective factors in hiring head coaches). Duru describes the skills schools say they look for as 'good at recruiting, good in the living room [with potential recruits and their families], that they can galvanize people.' *Id.* at 48 (quoting Telephone Interview with Jeremi Duru (Mar. 20, 2007)). Maravent and Tario explain that search committees often talk about finding a "good fit." *Id.* at 47 (analyzing hiring criteria). By saying that the hired coach was a good fit, schools can avoid admitting what was really considered during the hiring process. *See id.*

317. *See* Bridgeman, *supra* note 10, at 263-64 (accentuating susceptibility to categorization and stereotypes).

318. *See id.* at 267-68 (indicating which studies show that unconscious bias can be eradicating from selection processes).

> In light of the work in social psychology it makes sense that the selection procedures at the player level in sports would yield better results than those found in upper level sports jobs and other high-level jobs because the procedures employed at the player level have more of the attribute scholars have shown to be necessary to overcome or lessen bias.

Id. at 268. Rather, "the procedures used may even exacerbate the problem because often these jobs are hired through social networks to which few minorities have access." *Id.* at 271 (explaining that in NFL Rooney Rule was able to change this in NFL).

> [B]ias can be lessened when people are sufficiently motivated to do so; when they have sufficient information; when they are in the right mood when making a decision; when the structure of the situation is such that the categorizing of information, which leads to bias, is either not present

A person may be motivated to control bias either because of one's own values or because one will be held accountable for the decision.[319] This reduces bias because the decision-maker responds by being more careful and deliberate, therefore relying less on stereotypes and categorization and more on available information.[320] In recruiting college football coaches, it is certain that athletic directors, as decision makers, are held accountable for employment selections and thus, are motivated to hire the best candidate.[321] Consequently, something must be done to supplement the value that athletic directors give to eradicating bias.[322]

A decision-maker can eliminate bias by removing biasing information – race, in this instance - from one's awareness.[323] Moreover, bias is reduced by resolving ambiguity, which can be accomplished through the use of a sufficient timetable to evaluate the candidates, a broad solicitation of information from the candidates and a more detailed criterion by which to assess the candidates.[324] While it is

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> or not salient; or when the situation lacks the ambiguity that often results in bias.

Id. at 268.

319. *See id.* (citing SUSAN T. FISKE, INTERDEPENDENCE AND THE REDUCTION OF PREJUDICE, IN REDUCING PREJUDICE AND DISCRIMINATION 116-17 (Stuart Oskamp ed. 2000)).

320. *See id.* (establishing how deliberation and additional time will lead to diversification).

321. *See id.* at 273 (detailing transparency and accountability in hiring process).

322. For a further discussion of athletic directors' current values, see *supra* notes 75-96 and accompanying text.

323. *See* Bridgeman, *supra* note 10, at 268-69 (citing Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of 'Blind' Auditions on Female Musicians*, 90 AM. ECON. REV. 715 (2000)). Major symphony orchestras were able to eliminate unconscious bias and address the problem of underrepresentation of women by implementing blind auditions. *See id.* at 272-73 (discussing results of blind auditions). By switching to blind auditions, the orchestras were able to increase the representation of women by three to five times. *See id.* at 273 (presenting that before blind auditions, ten percent of new hires were women, while afterward, one third to one half of new hires were women depending on city).

324. *See id.* at 269 (citing Debra E. Meyerson & Joyce K. Fletcher, *A Modest Manifesto for Shattering the Glass Ceiling*, HARV. BUS. REV., Jan.-Feb. 2000, at 133). In Bridgeman's articles, she notes how Meyerson and Fletcher explain that:

> [A] particular investment firm tried to hire more women by increasing the number of interviews. When this did not work, they investigated their entire recruiting practice . . . . As part of the investigation they examined their interviewing procedures, the questions they asked during interviews, and the places from which they recruited candidates, all in an attempt to identify what might be preventing them from hiring women. This investigation revealed that in the short thirty minutes they had been allowing for interviews, managers often relied on their first impressions, a practice which is "often a function of perceived similarity" and thus an easy way to exclude out-group members . . . . As a result of these findings, the com-

difficult to imagine an interview process for hiring coaches that prevents an athletic director from learning the candidate's race, it would be relatively simple for athletic directors to eliminate ambiguity within searches by lengthening time deadlines, soliciting more information, and articulating criteria for evaluation.[325]

Gordon discusses a method employed by the San Francisco 49ers that simultaneously lessened the effects of unconscious bias and social networks.[326] The approach, designed by Paraag Marathe, used empirical research to compile a list of qualified candidates for the head coaching position.[327] First, Marathe studied performance data, such as playoff appearances, winning percentage, and first season record relative to their predecessor's last season record to compile a list of "elite" coaches.[328] Second, the team examined common characteristics of these coaches, before and after becoming head coach, and found that they worked under other successful coaches and tended to be disciplinarians.[329] Third, the team searched for these qualities among assistant coaches in the NFL; the investigation yielded twelve candidates.[330] Fourth, the team narrowed the field to five candidates, interviewed them, and

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> pany lengthened their interviews to forty-five minutes and required the managers to follow a set protocol of questions which focused the discussion on what a candidate could contribute to the firm's mission. As a result of these changes, the company obtained different, and better, information about all candidates – men and women – and begin to hire a more diverse group.

Id. at 273-74 (analyzing two commentators' study of successful attempts at diversifying workforce).

325. *See id.* at 273 (discussing example of investment firm's increased interview time for job applicants diversifying workforce); *see also* Hiring Report Card, *supra* note 2, at 5 (listing grading criteria and best practices). Collins also explains that the Rooney Rule acts to slow down the hiring process and discourages preselection of a candidate absent legitimate consideration of other candidates. *See* Collins, *supra* note 2, at 905 (citing Scott Brown, *Steelers' Rooney Praised for 'Rule'*, KNIGHT RIDDER TRIB. BUS. NEWS, Feb. 3, 2007, at 1).

326. *See* Gordon, *supra* note 18, at 17 (explaining how NFL team conducted incredibly objective search for head coaches).

327. *See id.* (suggesting "The MBA Way" of using different interview processes to eliminate bias).

328. *See id.* (noting coaches that appeared on list included Bill Walsh, Mike Shanahan and Bills Parcells).

329. *See id.* at 17-18 (discussing 49ers approach to measuring quality utilizing qualitative factors).

330. *See id.* at 18 (evaluating 49ers approach to measuring quality). Marathe apparently did not look for these qualities among college head coaches in a previous study because statistics showed they generally did not meet expectations after being hired. *See id.* He also did not apply the qualities to former head coaches because they tended to be more expensive to hire than their subsequent performance was worth. *See id.*

eventually hired Mike Nolan.[331] By using objective criteria, the team was able to decrease the effect of unconscious and social network bias.[332] Although colleges and universities need not employ the same system as the 49ers, removing subjectivity from hiring decisions will expedite the diversification process for head coaches.[333]

B. Diversifying the Search Committee

The BCA believes that diversifying the search committee for head coaches is critical to increasing the number of minority head coaches.[334] The BCA found that for each additional minority on a search committee, the number of minority candidates interviewed increases by .5.[335] In an article about diversifying the managerial position in baseball, Aaron Walker suggested that teams form player-hiring committees to address diversity-hiring issues.[336] Walker theorized that player committees would alleviate effects of social networks and unconscious bias in the manager hiring process.[337] Although player-hiring committees would not be practical at the college level, universities could diversify their search committees with alumni and minority administrators.[338]

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331. *See id.* (setting forth final round of interview process). Gordon makes sure to note that two of five final candidate were black. *See id.* It was only at this final point in the interview process that the 49ers used subjective selection processes to narrow the field of candidates. *See id.* The team asked 49er alums for advice to narrow the field. *See id.* But at that point, all the candidates were already qualified according to objectively measurable criteria. *See id.*

332. *See id.* at 18 (noting effectiveness of coaching search using bias-removing network). Gordon concludes by suggesting that colleges model their searches after 49ers. *See id.* at 19.

333. *See* Bridgeman, *supra* 10, at 263 (offering that bias-removing interview methods will diversify coaching positions quickly).

334. *See* Louis, *supra* note 10, at 204 (detailing BCA's findings regarding benefits of diverse search committees).

335. *See* Hiring Report Card, *supra* note 2, at 9 (explaining tangible effect of including minorities on search committees).

336. *See* Walker, *supra* note 2, at 270 (referring to diverse search committees in baseball context). Walker outlined the plan and suggested "[t]he team would allow two to four players to participate in the search and interview process. *Id.* The players would then select who they want to be their representatives." *Id.*

337. *See id.* at 270-71 (rationalizing that although management would make final decision, plan would help still help diversify pool).

338. *See* Louis, *supra* note 10, at 204 (illustrating resources available to schools to diversify committees).

C. Outside Evaluations

The BCA, through the Hiring Report Card (HRC), pressures schools into employing best practices when hiring coaches.[339] The HRC evaluates the hiring processes of colleges and universities and shares the results with the public.[340] The HRC grades schools on a scale of A through F for their "inclusiveness and fairness" in hiring.[341] The report card consists of five categories: "Communication, Hiring/Search Committee, Candidates Interviewed, Reasonable Time, and Affirmative Action."[342] The most recent HRC graded thirty-one schools.[343]

Some contend that the HRC increased interviewing opportunities for minority coaches.[344] Now, minorities comprise thirty percent of the candidates interviewing for head coaching positions.[345]

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339. *See* Ford, *supra* note 6, at 90 (discussing Hiring Report Card); Louis, *supra* note 10, at 174-75 (noting BCA's release of Hiring Report Card). The BCA also publishes a report to assess the hiring practices in Women's College Basketball. *See generally* Black Coaches and Administrators, "SCORING THE HIRE:" A HIRING REPORT CARD FOR NCAA DIVISION I WOMEN'S BASKETBALL HEAD COACHING POSITIONS (2008) (exploring hiring decisions and practices in women's college basketball). The number of women coaches has actually decreased since the passing of Title IX and many are as concerned about the dearth of females in coaching as they are about the underrepresentation of minorities in college football coaching. *See id.* at 5.

340. *See* Louis, *supra* note 10, at 174-75 (specifying how BCA releases Annual Report Card and effect of putting universities' hiring processes under public scrutiny). The Institute for Diversity and Ethics in Sports at the University of Central Florida, directed by Dr. Richard Lapchick, also releases graded reports, but those reports evaluate collegiate athletics and the professional leagues as opposed to individual universities. *See generally Racial and Gender Report Cards 2001-2009*, TIDESPORT.ORG, http://www.tide sport.org/racialgenderreportcard.html (detailing institutes' graded reports over number of years) [hereinafter Tidesport Report Cards]. The most recent Racial and Gender report on collegiate athletics found declines in the hiring of minorities and females in key positions in collegiate sports. *See Report Faults Diversity*, *supra* note 7 (discussing decline in both racial and gender hiring practices in key positions). Richard Lapchick said that '[t]he numbers reflect a need for new strategies for more opportunities for people of color and women. This is the worst report card for college sport in many years.' *Id.*

341. *See* Ford, *supra* note 6, at 91 (featuring Hiring Report Card evaluation criteria). It is the BCA's policy that to not participate is in fact to participate. *See id.* at 20 (noting BCA's policy guidelines). Consequently, schools are not able to avoid the bad publicity they get for not conforming to best practices. *See id.* (identifying negative effects of non-conformance). Schools that do not participate receive an "F." *See id.* (linking lowest grade to non-participation).

342. Hiring Report Card, *supra* note 2, at 20.

343. *See id.* (detailing recent HRC grading).

344. *See* Ford, *supra* note 6, at 91 (predicting potential positive effects of HRC).

345. *See id.* (citing The Lack of Diversity in Leadership Positions in NCAA Collegiate Sports: Hearings Before the Subcomm. on Commerce, Trade and Consumer Protection of the H. Comm. On Energy and Commerce, 110th Cong. (2007) (testimony of Brand), *available at* http://energycommerce.house.gov/cmte

In the last HRC, however, the BCA was dubiously optimistic about the fact that no school received an automatic F.[346] They stated that on the one hand, "[s]chools are respecting the process," but on the other hand, schools continue to receive Fs.[347] The BCA also explained that just because the numbers have not increased does not mean that qualified coaches do not exist.[348] Rather, if schools continue to adhere to the BCA's hiring guidelines, the representation of minorities in head coaching positions will improve.[349]

D. Gestures of Solidarity From the Student-Athlete

The BCA and Floyd Keith advocate for student-athletes to consider the diversity of a school's coaching staff when deciding where to play.[350] Keith said "[w]hen student-athletes of color start making decisions to play where it is most likely that they have a fair and equitable opportunity to eventually coach and become an administrator, we will then, and only then, start to see a difference in the hiring process."[351] When the BCA formed, it tried to market apparel with the slogan "Don't Play Where You Can't Coach," but that effort did not garner much traction.[352] Nonetheless, the BCA remains adamant that social awareness by student-athletes will help address the scarcity of minority coaches.[353] Hannah Gordon agrees

_mtgs/110-ctcp_hrg. 022807.Brand-testimony.pdf). Consequently, one would think that minorities would subsequently make up 30% of all hirees; but minority coaching candidates are still being passed over for the final selection. *See id.* (mentioning common misconception concerning minority hiring practices).

346. *See* Hiring Report Card, *supra* note 2, at 28 (conveying HRC optimism despite low grades).

347. *Id.* (noting mixed reception of HRC framework).

348. *See id.* (exploring availability of minority coaches).

349. *See id.* (suggesting potential for minorities in head coaching market).

350. *See* Gordon, *supra* note 18, at 15-16 (analyzing BCA's "Don't Play Where you Can't Coach" campaign). Louis explains that the solidarity need not come from student-athletes alone. *See* Louis, *supra* note 10, at 184-85 (describing how parents, future students and recruits will all take notice of schools that are sued for discrimination). He said that ordinary students can consider a school's reputation for institutional discrimination when considering where to attend. *See id.* (cautioning that drop in students and tuition that may occur if schools are shunned following discrimination law suit). Moreover, Louis explained that corporations can consider what school to sponsor based on their position towards hiring minorities. *See id.* at 185 (explaining how publicity of university's discriminatory practices will make corporate sponsors "think twice" about donation and advertising).

351. Ford, *supra* note 6, at 111 (citing Add Seymour Jr., *The Diversity Lessons the NCAA Can Learn From the NFL*, DIVERSEEDUCATION.COM, Feb. 1, 2007, http://www.diverseeducation.com/artman/publish/article_6952.shtml)

352. *See* Gordon, *supra* note 18, at 15 (characterizing marketing effort as missed opportunity that never caught on).

353. *See* Hiring Report Card, *supra* note 2, at 12 (indicating BCA's continued optimism for educating student athletes about diversity issues).

that "[if] high school recruits choose to go to schools whose staffs reflect the diversity of their players, universities will be forced to change."[354] The difficulty, however, lies with the pressures which recruits face when deciding what school to attend and whether it is realistic to expect them to risk their careers for social change.[355]

E. Political Intervention

Diversity in coaching may be most easily achieved through Congressional Intervention.[356] On February 28, 2007, the United States House of Representatives Subcommittee on Commerce, Trade and Consumer Protection held a hearing on the lack of diversity in the leadership of collegiate sports.[357] The Subcommittee and speakers discussed a number of solutions, including: providing financial incentives to schools that hire minority coaches; eliminating the involvement of boosters in the hiring process; and implementing a Rooney Rule equivalent.[358] However, two years have passed since the hearing and Congress has failed to pursue the issue further.[359]

State-level politicians are also involved in the effort to diversify college football head coaching positions.[360] Richard Codey, the New Jersey Senate President, called upon Brand and the NCAA to adopt an equivalent of the Rooney Rule.[361] Moreover, Oregon re-

354. Gordon, *supra* note 18, at 15.

355. *See id.* at 15-16 (noting attempts by UCLA athletes to raise awareness about lack of diversity in colleges).

356. *See* Ford, *supra* note 6, at 111 ("Congressional action is necessary and may be on horizon.").

357. *See* Diversity Hearing, *supra* note 12 (portraying hearing on lack of diversity in college coaching).

358. *See* Nichols, *supra* note 6, at 156-57 (discussing hearing and solutions discussed).

359. *See id.* at 157 (noting slow movement by Congress on positive ideas voiced at hearing).

360. *See* J. Manion, *Codey Urges NCAA to End De-Facto Discrimination Against African-American Football Coaches*, POLITICKERNJ.COM, (Dec. 26, 2008), http://www.politickernj.com/jmanion/26265/codey-urges-ncaa-end-de-facto-discrimination-against-african-american-football-coaches (discussing N.J. Senate President and then Acting Governor Richard J. Codey's call upon Brand to more aggressively pursue collegiate equivalent of NFL's "Rooney Rule"); *see also* Mike Donovan, *Oregon's Proposed Rooney Rule Does Not Go Far Enough*, EXAMINER.COM, Mar. 4, 2009, http://www.examiner.com/x-2716-Oregon-College-Sports-Examiner~y2009m3d4-Oregons-proposed-Rooney-Rule-does-not-go-far-enough (examining shortcommings of representative Mitch Greenlick's minority coaching legislation).

361. *See* Manion, *supra* note 363 (highlighting Codey's call upon Myles Brand to more aggressively pursue collegiate equivalent of NFL's "Rooney Rule"). In his speech Codey stated:

> Clearly the NCAA's effort earlier this year to encourage colleges to hire more African American coaches was a gesture of good will that has failed

cently adopted a law codifying the Rooney Rule.[362] The law, however, does not just apply to football, but rather requires the State's universities to interview a minority each time it hires an athletic director or a head coach in any sport.[363] Oregon's law applies to the State's seven public universities until 2020.[364] Oregon's effort is now trying to be replicated in states such as Alabama, so the statutory approach can be more expansive.[365]

Bridgeman posits that discrimination law needs to be adapted to protect against unconscious bias.[366] She, however, believes Congress should make laws to create incentives for change, rather than changing Title VII to be more responsive to individual claims.[367] Consequently, Bridgeman proposes that the federal spending

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> . . . I think the NCAA [football] needs to renew their approach to the situation, perhaps [by] studying how the collegiate basketball scene was able to overcome similar obstacles over the last [twenty] years.

Id. (quoting Richard Codey). It is suggested that the success in men's college basketball can be attributed to high-ranking Division I schools hiring minorities who succeeded at low-ranking division I schools. *See* Nichols, *supra* note 6, at 151 n.16 (discussing successful diversity hiring in men's college basketball) (citing Jeff Zillgitt, *Sampson Making Sooners a Basketball Powerhouse*, USATODAY, Mar. 29, 2002, *available at* http://www.usatoday.com/sports/comment/zillgitt/2002-03-29-zillgitt.htm (last visited Oct. 31, 2009). Nichols suggests that because "there are over 220 fewer FBS programs than Division I men's college basketball programs, part of the problem could be this lack of 'lower end' programs." Nichols, *supra* note 6, at 151-52. In his call to action, Senator Codey wrote a letter to the NCAA asking for "real change." *See* Manion, *supra* note 363 (analyzing Codey's letter).

362. *See* Mark Hester, *Kulongoski Signs Bill Requiring Interviews for Minority Coaches*, OREGONIAN, July 22, 2009, http://www.oregonlive.com/sports/index.ssf/2009/ 07/kulongoski_signs_bill_requirin.html (noting that law has widespread support among Oregon's college football coaches).

363. *See* Richard Lapchick, *Oregon Hears the Call to Action*, ESPN.COM, May 22, 2009, http://sports.espn.go.com/ncf/columns/story?columnist=lapchick_richard&id=4199225 (describing advocacy efforts Sam Sachs and State Representative Mitch Greenlick).

364. *See* Hester, *supra* note 366 (explaining that law's sunset clause takes effect on January 2, 2020).

365. *See id.* (reporting Alabama State Representative John Rogers's intention to introduce similar bill).

366. *See* Bridgeman, *supra* note 10, at 285 (proposing ways that legislation may increase diversity in coaching).

367. *See id.* (supporting use of law "as a tool to create incentives for more widespread change"). President Lyndon Johnson used the federal spending power to motivate hospitals to desegregate. *See id.* (citing LU-IN WANG, DISCRIMINATION BY DEFAULT: HOW RACISM BECOMES ROUTINE 140 (2006)). He conditioned the receipt of Medicare funds on hospitals signing guarantees that they did not 'discriminate or segregate on the basis of race, color or national origin and that the facility was in compliance with Title VII guidelines.' *Id.* Ninety-two percent of hospitals were desegregated within four months. *See id.* (describing effects of President Johnson's hospital diversity plan). The use of the spending power was so effective because the financial incentives were "forward-looking," did not involve assigning blame, subjected all hospitals to the same pressures, and involved visible and easily verifiable goals. *See id.* (examining reason for plan's success).

power should be used to encourage employers, including colleges and universities, to examine their hiring procedures and amend them to provide meaningful opportunities for minorities.[368]

VII. CONCLUSION

The battle to diversify the head coaching positions within collegiate football is an important one.[369] But before advocates achieve this desired diversity, they will need to successfully convince universities that this goal is "for the good of all involved."[370] Such an effort may require demonstrating that the problem extends beyond collegiate football and sports in general, and reflects a societal tendency to exclude minorities from high-level positions.[371]

The NCAA should consider adopting the Robinson Rule to avoid litigation.[372] Not only will it address the problems facing minority head coaches at the collegiate level, but it will also have a ripple effect on diversity in the NFL by increasing the qualified candidates who can compete for coaching positions.[373] If the NCAA does not adopt the rule and the BCA assists in bringing a lawsuit

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368. *See id.* at 286 (proposing using federal spending power and positive incentives to bring about change). Bridgeman also suggested that federal grants be directed to fund research in mechanism aimed at lessening implicit bias in hiring processes. *See id.* (describing alternatives to use of federal spending power).

369. *See* Gordon, *supra* note 18, at 5 (debating why people should be concerned about lack of minority coaches in NCAA football). Gordon says that there are at least three reasons why we should care about the underrepresentation of minorities in head coaching:

> First, we should care out of a general interest in fairness, equity, and the meritocracy that sport is supposed to represent. Second, head coaches and assistant coaches are mentors and role models in the lives of the young men they coach. Because approximately half of those student-athletes are you men of color, it is important that they have strong black and brown male role models as well as white ones. Third, the prestige placed on the head coach position in football makes it a signal to society about who is valued. Sport is a microcosm of society, but is often a step ahead because of the opportunity it affords for people of different races to interact. It is a shame for sport merely to keep pace with society, reflecting America's lower value of men of color as leaders, a signal that is sent to athletes, aspiring coaches, and fans.

Id.

370. *See* Shropshire, *supra* note 2, at 470 (hypothesizing that showing society that lack of minority coaches is society-wide problem may be difficult). Shropshire notes that the Supreme Court has consistently supported the importance of diversity. *See id.* at 470 n.84 (citing Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990)).

371. *See id.* at 472 (noting that diversifying sports industry is not just about fixing one industry).

372. *See* Maravent, *supra* note 33, at 272-73 (explaining how Rooney Rule doubled number of African-American coaches in NFL).

373. *See id.* at 271-72 (accounting for Dennis Green, Tony Dungy, Marvin Lewis and Romeo Crennel were all assistant coaches in Division I before NFL).

against a university, the lawsuit will be difficult to win, as is the case for most Title VII cases.[374] Yet, with so much resistance from the NCAA and athletic directors towards implementing a program that has actual potential for diversifying the head coaching ranks, Title VII litigation may be a rapidly approaching last resort.[375] Because alternatives to litigation still exist, advocates should continue to lobby for change.[376] Even though the NCAA remains stubborn to accept change, advocates must persist in providing fresh alternatives in the hope that something viable will be adopted.[377]

Despite being constantly reminded of its inadequate response, the NCAA does not appear to be embarrassed. It seems comfortable with implementing superficial solutions to the diversity problem. Luckily, the NFL bears witness to the fact that the problem is corrigible. Therefore, when the NCAA is ready to address the dearth of minority coaches in college football, those minorities that have been excluded for so long will have an opportunity to demonstrate their capability.[378] Football is supposed to be a meritocracy, but until the glass ceiling for head coaches is shattered, the importance of merit will be confined to the football field.[379]

*Ron S. Hochbaum**

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374. *See* Nichols, *supra* note 6, at 171 (rationalizing that there is little chance overt racism will be involved). Nichols also discussed factors that might complicate litigation such as multiple decision-makers involved in the hiring process, discovering what criteria were considered in establishing qualifications, organizing a class, and financial resources. *See id.* (isolating potential hurdles faced by college coaches suing for racial discrimination).

375. *See id.* at 161-62 (discussing NCAA resistance to imposing rules on whom universities must interview). Louis explains that a lawsuit, however, is worthwhile because it will demonstrate to the public "that when it comes to 4th and Goal from the 1 yard line, a school with thirty thousand students, with tens of thousands of alumni, and millions of fans watching at home, is perfectly fine with putting its national title hopes into the hands of a Black athlete on the field. However, when it comes to calling that play from the sidelines, it appears the consensus is that that job is reserved for White head coaches." Louis, *supra* note 10, at 184.

376. *See* Maravent and Tario, *supra* note 33, at 48 (describing difficulties in pursuing diversity matters through litigation).

377. For a further discussion of ways to diversify NCAA head football coaches, see *supra* notes 307-70.

378. *See* Hiring Report Card, *supra* note 2, at 37 (commenting that solutions are present if NCAA wants to change).

379. *See* Walker, *supra* note 2, at 250 (arguing that race is still factor in sports).

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